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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

JOHN C. CARDIN,

Petitioner,

v.

JOSEPH B. DE LA CRUZ, THE HON. CAROL BURGETT, SANDY WELLS, OLIVER MASON, HAZEL OBI, JAMES HARP, GUY MCMINES, EARL BALLER, WAREN SHALE, MAX HUDSON, LAWRENCE HALL, PHILIP MARTIN, GERALD ELLIS, THE BUSINESS COMMITTEE OF THE QUINAULT INDIAN NATION, THE QUINAULT TRIBAL COURT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. In the absence of a treaty provision or federal statute conferring such power, does an Indian tribe possess the power to regulate a non-Indian's use of his own real property when such property is located within the exterior boundaries of the tribal reservation?

II. In the absence of a treaty provision or federal statute conferring such power, does an Indian tribe possess tribal constitutional power to create and impose judicial enforcement of tribal regulations against a non-Indian acting on his own real property when such property is located within the exterior boundaries of the tribal reservation?

III. May a federal court property find such powers to exist in the absence of (1) approval by the Secretary of Interior of the tribal constitution or ordinance exerting such powers, and (2) any factual finding by a federal court that, after an evidentiary hearing, the conduct being regulated threatens or has

a direct effect upon the political integrity, economic security, or health and welfare of the tribe?

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JOSEPH B. DE LA CRUZ, et. al.,

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PETITION FOR WRIT OF CERTIORARI

Petitioner John C. Cardin respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 15, 1982.

OPINION BELOW

The opinion of the Court of Appeals, reported at ___ F.2d ___ (9th Cir., 1982), appears in Appendix A hereto. The order of the District Court for the Western District of Washington, which

granted Petitioner Cardin's motion for preliminary injunction and which was the subject of the appeal to the Court of Appeals, is unpublished, but appears in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 15, 1982. This petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATY PROVISIONS, STATUTES AND EXECUTIVE ORDERS INVOLVED

This case involves the Constitution of the United States, particularly Article I, Section 8, Clause 3, and the Fifth and Fourteenth Amendments (Appendix C).

This case also involves the Treaty of Olympia, 12 Stat. 971 (1855) (Appendix D), the Executive Order of November 4, 1873, 1 Kapp. 923 (Appendix E), the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. 331 et. seq. (Appendix F), and the Allotment Act of 1911, Ch. 246, 36 Stat. at L. 1345 (Appendix F).

STATEMENT OF THE CASE

The Quinault Indian Reservation is located on the west side of the Olympic Peninsula, which forms the northwest portion of the State of Washington. The reservation was originally created by the Treaty of Olympia, 12 Stat. 971 (1855), and was subsequently expanded to its present boundaries by the Executive Order of November 4, 1873), 1 Kapp. 923.[1]

In October of 1978, the Petitioner John Cardin and his wife purchased thirty acres of land within the reservation. The land, of which the alienation from Indian ownership was allowed by the General Allotment Act of 1887, had been in non-Indian ownership since 1928. It is located in the small town of Queets, Washington, and abuts both the east and west sides of U.S. Highway 101, the principal highway around the periphery of the Olympic Peninsula, serving federal, state, other public, and non-Indian land as well as the Quinault Reservation. On

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[1]The History of the reservation is set forth in U.S. v. Halbert, 283 U.S. 753 (1930).

Mr. Cardin's land, and purchased along with it, is a small grocery store, upon which Mr. Cardin made substantial physical improvements and which Mr. Cardin began to operate on May 31, 1979. Since the time of purchase, he has resided on the store premises with his wife and two children. The store, when operating, is open to the general public and thus serves both the residents of Queets, who are predominantly Indian, and the travelers along Highway 101, including interstate travelers.[2]

On June 11, 1979, the Quinault Tribal Business Committee requested Mr. Cardin to cease his operation of the store on the grounds that he had not obtained an occupancy permit from the tribal authorities. Mr. Cardin, however, declined to comply with the request. The tribal authorities went into Quinault Tribal Court the next day, June 12, and there obtained an injunction against further

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[2]On a representative day, October 24, 1979, 91 customers were non-Indian (10 from outside Washington State) and 35 customers were Indian.

operation of the store, on the grounds that the Quinault constitution and Code of Laws (Appendix I) gave the Quinault Tribal Court subject matter and personal jurisdiction over Mr. Cardin and that operation of the store without a tribal occupancy permit violated the Quinault tribal building code (Quinault Tribal Code of Laws, Section 5.05.03, Chapter 18.03.). Pursuant to this injunction, the Quinault tribal police forcibly closed the store that same day.

Four days later, on June 16, the tribal authorities issued a temporary certificate of occupancy, and thereby allowed the store to be reopened. Mr. Cardin, however, did not make all the repairs the tribal authorities wanted, and accordingly the tribal authorities again invoked tribal court jurisdiction, commencing an injunctive action in the Quinault Tribal Court on September 27, 1979, based on the same allegations of jurisdiction and purported violation. Mr. Cardin, consequently, filed this action, which is the subject of the petition for certiorari, in the U.S. District Court for the Western District

of Washington on October 4, 1979. This action, which joined as defendants all members of the Quinault Tribal Business Committee, the tribal chairman, the tribal judge, and the tribal police, challenged the authority of the defendants to enforce tribal business regulations against Mr. Cardin in tribal court, and sought an injunction against their efforts to do so.

Evidence was taken on affidavit and cross-examination before U.S. Magistrate (Appendix H). In April of 1980, when they reactivated the pending tribal court action and obtained, on April 11, a preliminary injunction against further operation of the store. Mr. Cardin was served with this injunction on April 14, 1980, and the store was closed that same day (Appendix G).

Mr. Cardin did not appear at any of the tribal court proceedings, and through his attorney consistently challenged the jurisdiction of the tribal court over him.

In the meantime, the U.S. Magistrate, to whom the District Court action had been earlier referred, recommended that the action be dismissed for lack of fed-

eral question jurisdiction (Appendix H). The District Court rejected this recommendation, and granted Mr. Cardin a preliminary injunction against the tribal officials on May 29, 1980 (Appendix B). In granting the injunction, the District Court relied upon the principles set forth by this Court in Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978).

The Court of Appeals, on review, held that these principles were inapplicable, and accordingly reversed.

The exercise of tribal authority upheld by the Court of Appeals, i.e., the tribal court's enforcement of a tribal building code to the property of a non-Indian, has not been approved by the Secretary of Interior, nor do tribal officials admit of any need for any federal approval as they assert that tribal governmental and judicial powers arise solely out of the Constitution of the Quinault Indian Nation.[3] Unlike

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[3]See, Constitution of the Quinault Indian Nation, 1975, Article V, Section 3. (Appendix I) and testimony of Respondent Joseph DeLaCruz at Transcript of Proceedings on November 9, 1979 (Appendix H at pages 129a - 131a).

the tribal constitutions of most Washington tribes, the Quinault constitution does not provide for federal approval before a tribal ordinance may become effective.[4]

The Quinault constitution does, however, claim sweeping authority over non-Indians within the reservation. Article I, Section 1, entitled "Sovereignty" provides:

> "Notwithstanding the issuance of any patent, the jurisdiction and governmental power of the Quinault Nation shall extend to: (a) all lands, resources, and waters reserved to the Quinault Nation pursuant to the Treaty of Olympia, 12 Stat. 971, established by Executive Order dated November 4, 1873 (1 Kapp. 923) and to all persons acting within the boundaries of those

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[4]Compare, e.g., the constitutions of the Colville, Lummi, and Makah tribes involved in Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1979), which all provide for review and approval by the Secretary for ordinances affecting non-members. See specifically, Jt. App. 66 (Colville Constitution, Article V, Section 1(e)), 79 (Lummi Constitution, Article VI, Section 1(l)), and 90 (Makah Constitution, Article VI, Section 1(j), No. 78-630, O.T. 1978).

reserved lands or waters;. . ." Constitution of the Quinault Indian Nation, (1975), Article I, Section 1. (Emphasis supplied.)

In upholding the Tribe's claim of sovereignty, as applied to Mr. Cardin and his store, the Court of Appeals relied principally upon certain dicta in Montana v. United States, 450 U.S. 544 (1981) (See Appendix A), stating:

> ". . . As this circuit has observed, the Supreme Court's decision in Montana v. United States, 450 U.S. 544, 101 S. Ct. 1254, 67 L.Ed.2d 493 (1981), established that the dependent status of Indian tribes has implicitly divested them of power to regulate, in general 'the conduct of non-members on land no longer owned by, or held in trust for the Tribes.' Colville Confederated Tribe v. Walton, 647 F.2d 42, 52 (9th Cir. 1981). Yet the Montana decision acknowledged that the tribes have retained the power to impose certain kinds of regulations on the activities of a non-member on fee lands within their reservations:
>
> > "'To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their

> reservation, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the policital integrity, the economic security, or the health or welfare of the tribe.'

"Montana, supra, 450 U.S. at 565-566, 101 S.Ct. 1258, (citations omitted). The Tribe's exercise of civil jurisdiction over appellee's business in the instant case belongs to both of the broad categories in which, according to Montana, Indian tribes retain their sovereign powers. First, the Tribe is regulating the activities of a non-member, appellee, who has 'enter[ed] consensual relationships with the [T]ribe . . . through commercial dealing.' Second, the conduct that the Tribe is regulating 'threatens or has some direct effect on. . .

> the health or welfare of the [T]ribe.' Thus, the Tribe retains inherent sovereign power to impose its building, health and safety regulations on appellee's business, notwithstanding appellee's ownership in fee of land on which the store stands . . . ." (Emphasis original).

At no stage in the federal court proceedings did the court find that Mr. Cardin consented to the jurisdiction of the Quinault Tribal Court or that the sale of merchandise to some Indians on his property constituted an implied consent to that jurisdiction. Nor did the court find that Mr. Cardin's activities threatened the health or welfare of the Tribe or its members. While it is certainly not contested that some Quinault tribal members made purchases at the store while it was operating, no findings of actual or potential harm to those members or other non-Indian customers have been made.[5] The Court of Appeals,

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[5]The Report and Recommendations of the U.S. Magistrate John L. Weinberg issued February 22, 1980, acknowledged "improvements and repairs deemed necessary by the Tribe" and "alleged deficiencies in the property" but made no factual findings of threat of harm. The conclusion of

as we have seen, found no difficulty in holding that the tribal health and welfare required that Mr. Cardin's store be subject to the Tribe's jurisdiction.[6]

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW AFFECTING INDIANS AND NON-INDIANS NATIONWIDE WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Problem

One might have hoped that, after almost two centuries and dozens of decisions by this Court regarding the status and powers of Indian tribes, the issues presented here would have been defini-

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this recommendation that no federal question jurisdiction exists herein was subsequently reversed. See Appendix H at page 5 and Appendix B at pages 8-10.

[6]The tribal court did enter findings of fact in conjunction with its issuance of the April 11, 1980, injunction. The finding relevant here is as follows:

> "11. There is a significant risk of immediate and irreparable harm to the public health and safety if Defendant is allowed to invite the public into a building which is unsafe and in which contaminated food may be offered for sale.

tively settled. But such is not the case, as can be shown by the two most recent decisions in this area, Montana v. United States, 450 U.S. 544 (1981) and Merrion V. Jicarilla Apache Tribe, ___ U.S. ___, 50 U.S.L.W. 4169 (January 25, 1982).

To put the problem in context, a short recapitulation of what has been settled may be useful. First, it is settled that an Indian Tribe has no criminal jurisdiction over non-Indians no matter where, within the reservation boundaries, the offense takes place, whether on Indian or non-Indian land. The exercise of criminal jurisdiction is inconsistent with tribal dependent status. Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978).

On the civil side, in contrast, in certain situations the nature of the non-Indian activities which the tribe is attempting to regulate will be decisive. Compare Montana v. United States, supra, (tribal jurisdiction to regulate hunting and fishing by non-Indians on non-Indian land held invalid) with Merrion v. Jicarilla Apache Tribe, supra, (tribal

jurisdiction to tax non-Indian activities in severing oil and gas on tribal lands held valid). What is completely unclear, however, after Montana and Merrion, are the criteria or principles to be applied in determining what those "certain situations" are.

B. Montana

In Montana, the principal grounds for the Court's holding were two fold. The first was the Congressional policy embodied in the allotment acts--in particular, the General Allotment Act, 24 Stat. 388, 25 U.S.C. 331 (See Appendix F) and the Crow Allotment Act of 1920, 41 Stat. 751, pursuant to which the reservation land had passed into non-Indian ownership. Montana, supra, at 557-559. In note 9, the Court quoted the Court of Appeals below:

> "'There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the Congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs

> and jurisdiction. (Citations omitted). It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. And it is hardly likely that Congress could have imagined that the purpose of peaceful assimilation could be advanced if fee-holders could be excluded from fishing and hunting on their acquired property.'" (Emphasis supplied).

The second ground was this Court's decision in Oliphant. Montana, supra, at 564-565.

> "The Court recently applied these general principles in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, rejecting a tribal claim of inherent sovereign authority to exercise criminal jurisdiction over non-Indians. Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns, the Court quoted Justice Johnson's words in his concurrence in Fletcher v. Peck, Cranch 87--the first Indian case to reach this Court--that the Indian tribes have lost 'any right of governing every person within their limits

except themselves.' Id., at 147, Oliphant v. Suquamish Indian Tribe, supra, 435 U.S. at 209. Though Oliphant only determined inherent tribal authority in criminal matters (note 14 omitted),[7] the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe."

But there immediately follows the language which was seized upon by the Court of Appeals in this case and which turned the previous clarity into confusion.

". . . To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. Williams v. Lee, 358 U.S. 217, 223; Morris v. Hitchcock, 194 U.S. 384; Buster

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[7]See discussion of note 14 at page 18 below.

v. Wright, 135 F.2d 947, 950 (CA8); see Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1979). A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See Fisher v. District Court, 424 U.S. 382, 386; Williams v. Lee, 358 U.S. 217, 220; Montana Catholic Missions v. Missoula County, 200 U.S. 118, 128-129; Thomas v. Gay, 169 U.S. 264, 273 (Footnote Omitted).[8]

Montana, supra, at 565, 566.

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[8]The Court may be intending in this passage to do no more than explain in some detail a principal it had previously expressed.

> ". . . But exercise of tribal power beyond what is necessary to protect tribal selfgovernment or to control internal relations is inconsistent with the dependent status of the tribe, and so cannot survive without express Congressional delegation. Mescalero Apache Tribe v. United States, 411 U.S. 145, 148; Williams v. Lee, 358 U.S. 217, 219-220; United States v. Kagama, 118 U.S. 375, 381-382; see McClanahan v.

The Court of Appeals' application of this "health and welfare" language does not square with note 14 of that opinion:

> "[14]By denying the Suquamish Tribe criminal jurisdiction over non-Indians, however, the Oliphant case would seriously restrict the ability of a tribe to enforce any purported regulation of non-Indian hunters and fishermen. Moreover, a tribe would not be able to rely for enforce-

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Arizona State Tax Commission, 411 U.S. 164, 171." Montana, supra, at 564.

That is not, however, how the Court of Appeals applied this passage. Indeed, it is clear from an opinion of the same Court of Appeals panel in a companion case, Confederated Salish and Kootenai Tribes v. Namen, ___ F.2d ___ (No. 80-3189, January 11, 1982) (Namen II), that it views this passage as creating an exception to the principle quoted immediately above, and not simply explaining it.

> "Second, the Montana Court acknowledged certain exceptions to the general rule that tribes were divested of powers not necessary for self-government or internal relations. In particular, '[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" Namen II, ___ F.2d ___ at 207.

> ment on the federal criminal trespass statute, 18 U.S.C. 1165, since that statute does not apply to fee patented lands." (Emphasis supplied.)

Montana, supra, at 565. It is consistent with both the "health and welfare" language relied upon by the Court of Appeals and Montana's note 14 quoted here that non-Indian immunity from the enforcement of tribal law does not threaten the political integrity, economic security, or health or welfare of the tribe. Further the Court of Appeals' application of the Montana dicta is inconsistent with the reality that violation of Indian criminal law by non-Indian activity, enforcement against which is prohibited by the Oliphant opinion, is far more threatening to the health and welfare of tribal members than is violation of Indian building regulations.

Under the application of the Montana dicta by the Court of Appeals, any non-Indian business operating on non-Indian land would be subject to tribal regulatory jurisdiction, at least if that business allows any tribal member to deal

with it.[9]

Nor is it clear that Mr. Cardin would be free of tribal jurisdiction, under the Court of Appeals' application of Montana, even if he used his building only as a home, as he is doing now. For the possibility would remain that he might invite tribal members in as guests; and that mere possibility would trigger tribal jurisdiction. Indeed, under the "health and welfare" standard as applied by the Court of Appeals, it would appear that the tribe need only show the minimal interests which must be shown by any

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[9]The seriousness of this problem is compounded by the fact that the business operator may have no choice in the matter--he may be violating state law, federal law, or both if he tries to preserve his freedom from tribal jurisdiction by refusing to deal with tribal members. See, Wash. Rev. Code 9.91.010, imposing criminal sanctions for refusal by businesses like Mr. Cardin's to deal with persons because of their race. See also 42 U.S.C. 1982, and Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

local government in asserting civil regulatory jurisdiction based on its general police power existing under state law. Unlike regulations adopted pursuant to such power in cities and counties, tribal regulations are promulgated exclusively by tribal members without non-member involvement. Membership is, further, racially limited.

If these same minimal interests give rise to tribal power to enforce civil regulations against non-Indians, the protections afforded non-Indians by the policy embodied in the General Allotment Act and by the principles established in Oliphant are wiped out. The "health and welfare" exception neatly swallows the general rule.

That our assertion is in no way exaggerated is strikingly illustrated in a recent decision of the Tenth Circuit, upholding the tribal zoning code as applied to a non-Indian developer of non-Indian lands, on the basis of the "health and welfare" language in Montana.[10] Moreover, the Ninth Cir-

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10 The factors relied upon by the Tenth

cuit's own application of the "health and welfare" language in Namen II, supra, is similar, see note 9; for it gave to the Tribe complete regulatory jurisdiction over the south half of a large lake even though almost all riparian lands along the shore of that south half had been alienated to non-Indians.

Circuit were stated as follows:

> "The subdivision proposed by the Develpers is located in the 25 square mile Lower Arapahoe Area of the Reservation. About one-third of the land immediately adjacent to the subdivision is tribal land held in trust. The other two-thirds is about equally divided between land held in trust for individual Indians, and fee land largely owned by non-Indians. The trial court found that the Tribes have a significant and substantial interest in the area. It includes grounds were traditional tribal ceremonies are held annually. Two major pow wows are held annually within five miles of the subdivision. Within the same distance are two predominately Indian schools, two Indian cemetaries, and an Indian activity hall. The subdivision is within an Indian reclamation project and the developers have made seven unauthorized ditch crossings. Within the Lower Arapahoe Area are 241 Indian-occupied dwellings housing 1,345 people and 110 non-Indian occupied dwellings." Knight v. Shoshone and Arapahoe Tribes, No. 80-1810, February 8, 1982, Slip. Op. 7.

If the holding and grounds of Montana are to have any continuing vitality, and to afford any degree of protection to the tens of thousands of non-Indians who have been invited onto Indian reservations by the federal government, through the General Allotment Act, the decision of the Court of Appeals must be reviewed and reversed.

C. Merrion v. Jicarilla Apache Tribe

In Merrion, the uncertainty was further compounded. Although it involved, as did Montana, an assertion of tribal power over non-Indians, the Court's opinion did not discuss or even mention, Montana.

The Court did state, however:

> ". . . We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe. . . ." Merrion, supra, at 4172.

This tells us nothing, unfortunately, about tribal jurisdiction over a nonmember conducting business off of tribal lands, with tribal members, but not the tribe itself. The "territorial compon-

ent" would presumably not apply in such a case--which is the case presented here.

On the other hand, the Court justified the tax involved in Merrion--imposed upon non-Indian activities on tribal lands -- in the following terms:

> ". . .The power to tax is an essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management. This power enables a tribal government to raise revenues for its essential services. The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction. See, e.g., Gibbons v. Ogden, 9 Wheat. 1, 199 (1824).
>
> "The petitioners avail themselves of the 'substantial privilege of carrying on business' on the reservation. Mobile Oil Corp. v. Commission of Taxes, 445 U.S. 425, 437 (1980); Wisconsin v. J.C. Penney

> Co., 311 U.S. 435, 444-445 (1940). They benefit from the provision of police protection and other governmental services, as well as from '"the advantages of a civilized society"' that are assured by the existence of tribal government. Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207, 228 (1980) (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 445 (1979)). Numerous other governmental entities levy a general revenue tax similar to that imposed by the Jicarilla Tribe when they provide comparable services." Merrion, supra, at ____.

This language too, we are sure, will quickly be seized by tribal advocates as supporting their assertion of reservation-wide jurisdiction over non-Indians, of essentially the same scope and character as that asserted by "other governmental entities." Though the Court in Merrion must generally have assumed that tribal governmental and judicial power is like that of general purpose local governments, and though that assumption is consistent with the Court of Appeals application of the Montana "health and welfare" dicta, that assumption is not consistent with the holdings of Oliphant

or Montana.

D. The Constitutional Issue

Another result of the Court of Appeals decision is this: Mr. Cardin would not be subject to the broad jurisdiction of a government in which he cannot participate. Though his home, family and business would be within the territorial jurisdiction of that government, he is precluded from participating in that government by reason of his race--he has no Indian blood. Further, though his actions would be within the subject matter jurisdiction of tribal courts, he would have no means to review its judgments--the tribal courts do not recognize the federal or state courts as courts of review jurisdiction.

No matter how many times this Court avoids this constitutional problem--as it did in Merrion--the problem will not go away. And it is presented here in a most aggravated form.

In Merrion, the Court noted that ". . . the Tribe must obtain approval of the Secretary (of Interior) before any tax on nonmembers can take effect." 50 U.S.L.W. 4172. This, it was believed,

would "minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner." ibid. In Merrion, the Tribe's constitution limited tribal power by subjecting the exercise of inherent tribal power to the "limitations imposed by the Constitution of the United States, applicable Federal Statutes, and the regulations of the Department of the Interior. . . ." Revised Constitution of the Jicarilla Apache Tribe, Article XI, Section 1, ibid. at 4170. The Jicarilla Apache Tribe was organized under the Indian Reorganization Act of 1934, Ch. 576, 48 Stat. 984, 25 U.S.C. 461 et. seq.

The tribal power asserted here, in contrast, is not subject to these constraints. The Quinault Tribe is self-organized through its constitution. Approval by the Secretary of Interior has never been given for the Tribe's 1975 constitution. The tribe asserts inherent and historical tribal power. (See note 4.) The Quinault constitution prohibits Mr. Cardin's participation in tribal government by excluding non-Indians from membership. Tribal officials assert that

their actions are not subject to restriction under the Fifth or Fourteenth Amendments to the U.S. Constitution. See, Talton v. Mayes, 163 U.S. 376 (1896). The doctrine of tribal immunity, see Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1977), prevents Mr. Cardin from challenging the official, governmental acts of tribal members while the Court of Appeals below and the Court in Merrion retain the governmental cloak for any member's action based on tribal determination of the potential threat of harm to any other member. Damage claims against an Indian arising from non-tribal action are frustrated by tribal or common ownership of property.

Further, the Quinault Tribe does not recognize the power of federal courts to construe the extent of tribal court jurisdiction. In this case below, the Quinault Tribal Court judge enjoined Mr. Cardin from conducting business and directed tribal police to forcibly close his store during the pendency of this action in District Court in which the extent of its power was in question. To be sure, the most prevalent argument of

respondents in the proceedings below was that the federal courts did not have jurisdiction to determine the limits of Indian court jurisdiction.

The Constitution of the Quinault Indian Nation provides at Article V, Section 3, for an "'"independent Tribal Court" created by the governing Business Council of the Tribe. The Quinault Tribal Code of Laws, at Section 18.03, authorizes the tribal court to remove persons from their property or to remove and destroy their property in order to remedy court-found violations of tribal law. There is no provision for appellate review.

As we see, the Quinault Tribe asserts the broadest possible sort of jurisdiction over non-Indians within the reservation. Tribal court enforcement of the building code involved in this case is but an exercise of that broad assertion of jurisdiction. But as the various opinions in Holt Civic Club v. City of Tuscaloosa, 439 U.S 60 (1978) show, the broader the scope of the jurisdiction asserted against those who cannot participate in the governmental process, the

more serious becomes the constitutional problem. Certainly, the constitutional rights of non-Indians do not diminish when the persons asserting jurisdiction over them are Indian rather than fellow non-Indians, as in Holt Civic Club.

The Court in Merrion and the Court of Appeals in this case have formed principles of tribal power from the analogue of municipal government. But in doing so they have overlooked the constraints placed on municipal governmental action by an individual's constitutional rights and immunities. As this Court acknowledged in Oliphant, the constitutional rights of non-Indians have been appropriately considered by Congress when the issue of Indian jurisdiction over non-Indians has arisen. They are appropriately considered in this case.

CONCLUSION

For the reasons given above, the Petition for Certiorari should be granted.

Respectfully submitted,

James H. Davenport
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Of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN C. CARDIN, Plaintiff-Appellee, vs. JOSEPH B. DE LA CRUZ, et al., Defendants-Appellants.	No. 80-3244 OPINION

Appeal from the
United States District Court
for the Western District
of Washington
Honorable Walter T. McGovern,
Chief Judge, Presiding
Argued and Submitted
September 8, 1982

Before: PREGERSON and POOLE, Circuit Judges, and KELLAM,* District Judge.

PREGERSON, Circuit Judge:

This is an appeal from an order of the United States District Court for the

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* Honorable Richard B. Kellam, Senior District Judge for the Eastern District of Virginia, sitting by designation.

Western District of Washington enjoining appellants, officers of the Quinault Indian Tribe ["the Tribe"], from enforcing tribal building, health, and safety regulations against appellee. Appellee, a non-Indian, owns land within the Quinault Reservation on which he operates a store that allegedly violates tribal regulations. The district court enjoined enforcement of these regulations against appellee after concluding, in light of Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), that the Tribe lacked jurisdiction to enforce its regulations against a non-Indian on land he owned in fee. For the reasons explained below, we disagree and accordingly reverse.

BACKGROUND

Appellee, plaintiff below, is a non-Indian who owns a thirty-acre tract in the village of Queets in Jefferson County, Washington, located within the boundaries of the Quinault Indian Reservation. On the tract, which has been owned in fee by non-Indians since 1928, is the village's only grocery and general store. Even before appellee purchased the tract in October 1978, the Tribe had

urged the store's previous owner to correct certain alleged dangerous and unsanitary conditions that purportedly violated tribal building, health, and safety regulations.[1] When appellee bought the land and the store, he met with tribal officials and discussed the measures that the tribe wanted taken.

Without taking those measures, however, appellee reopened the store in May 1979. In June, the Tribe obtained an injunction in the tribal court directing appellee to close the store until he obtained a "certificate of occupancy" in accordance with the Tribal Code. Appellee refused, and tribal police forcibly closed the store. After four days, appellee obtained a temporary certificate of occupancy and reopened his store. He did not make the repairs and improvements the Tribe wanted, and in September 1979 the Tribe again sued in the tribal court

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1. Among other allegations, tribal authorities asserted that the store posed a fire hazard and that food kept there was exposed to a risk of rodent contamination.

to compel him to close the store.

Appellee then filed the instant action in federal district court, seeking to enjoin tribal officers from regulating the operation of his business. The Tribe agreed to defer action in the tribal court, with leave to reactivate that case upon notice to appellee. Such notice was given in February 1980, and appellee moved in the district court for a temporary restraining order blocking the Tribe's action. The Tribe postponed action in the tribal court until April 1980, when the tribal court granted a preliminary injunction against the operation of appellee's store.

The instant case was referred to a magistrate, who recommended the appellee's complaint be dismissed for want of federal-question jurisdiction. The district court, however, ruled that it did have jurisdiction, and enjoined the Tribe from enforcing its building, health, and safety regulations against appellee. This appeal followed.

DISCUSSION

Appellants contend both that the district court was without jurisdiction

to hear the instant case and that even if jurisdiction did exist, they should prevail on the merits. We reject their jurisdictional contention but agree with them as to the merits.

The district court correctly held that it had jurisdiction to hear this suit under 28 U.S.C. § 1331, which gives district courts jurisdiction over "civil actions arising under the Constitution, laws, or treaties of the United States." The crux of appellee's argument is that tribal regulation of his business runs afoul of the principles enunciated by the Supreme Court in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) -- principles that are not drawn from any specific statute or treaty, but rather form a part of federal common law. Since this action thus arises under federal common law, it falls within the general federal-question jurisdiction conferred by § 1331. Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972).[2]

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2. This circuit's holding in Trans-Canada Enterprises, Ltd. v. Muckle-

On the merits, the district court rejected appellants' argument that the power to impose reasonable health and safety regulations on appellee's business was an inherent sovereign power retained by the Tribe. The district court based its decision largely on its reading of Oliphant, supra, stating: "[T]he Court finds, in light of Oliphant, that the tribe's power of self-government to regulate the internal and social relations of its members does not extend to non-Indian plaintiff." Order Granting Injunctive Relief, at 10.

Oliphant established that, absent specific authorization by Congress, Indian tribal courts have no criminal

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shoot Indian Tribe, 634 F.2d 474 (9th Cir. 1980), does not compel a contrary conclusion. There the district court had enjoined enforcement of a tribal licensing ordinance against a non-Indian real estate developer. We reversed the district court, holding that it lacked subject matter jurisdiction. Trans-Canada differs decisively from the instant case, however, because the complaint there did not allege general federal-question jurisdiction. 634 F.2d at 476 n.4.

jurisdiction over non-Indians. But, as the Supreme Court noted, Oliphant concerned only the criminal jurisdiction of tribal courts. 435 U.S. at 196 n.7. The decision there rested partly on an examination of how the branches of the federal government, over the years, have viewed the prospect of Indian criminal jurisdiction over non-Indians, and partly on the Court's conclusion that such jurisdiction would impair the overriding federal interest in safeguarding the procedural rights of criminal defendants. Nothing in that reasoning suggests that Indian civil or regulatory jurisdiction over non-Indians is inconsistent with Indians' dependent status--the test that Oliphant recognized for deciding which of their inherent sovereign powers Indian tribes have lost. 435 U.S. at 208.

To hold that Indian tribes cannot exercise civil jurisdiction over non-Indians would, when combined with Oliphant, eliminate altogether any tribal jurisdiction over persons not members of the tribe, and thus reduce to a nullity the Supreme Court's repeated assertions that Indian tribes retain attributes of

sovereignty over their territory, not just their members.[3] Furthermore, tribal civil and regulatory jurisdiction over non-Indians has been explicitly approved in various contexts. In Williams v. Lee, 358 U.S. 217 (1959), the Court held that tribal courts had exclusive jurisdiction over a civil suit by a non-Indian against reservation Indians arising out of a transaction on the reservation. In Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-54 (1980), reservation Indians were held to have the power to tax non-Indian purchasers of goods on the reservation. And a tribal severance tax on oil and gas extracted by non-Indians from leased reservation land was upheld in Merrion v. Jicarilla Apache Tribe, 50 U.S.L.W. 4169 (U.S. January 25, 1982).

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3. See Montana v. United States, 450 U.S. 544, 563 (1981); White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); United States v. Wheeler, 435 U.S. 313, 323 (1978); United States v. Mazurie, 419 U.S. 544, 557 (1975).

The instant case does differ from those just cited in that here the Tribe seeks to regulate a non-Indian's activities on land which, though within the reservation's borders, is owned in fee by the non-Indian. As this circuit has observed, the Supreme Court's decision in Montana v. United States, 450 U.S. 544 (1981), established that the dependent status of Indian tribes has implicity divested them of power to regulate, in general, "the conduct of non-members on land no longer owned by, or held in trust for the Tribes." Colville Confederated Tribe v. Walton, 647 F.2d 42, 52 (9th Cir. 1981). Yet the Montana decision acknowledged that the tribes have retained the power to impose certain kinds of regulations on the activities of a non-member on fee lands within their reservations:

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of

> nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangments. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana, supra, 450 U.S. at 565-66 (citations omitted). The Tribe's exercise of civil jurisdiction over appellee's business in the instant case belongs to both of the broad categories in which, according to Montana, Indian tribes retain their sovereign powers. First, the Tribe is regulating the activities of a nonmember, appellee, who has "enter[ed] consensual relationships with the [T]ribe . . . through commercial dealing." Second, the conduct that the Tribe is regulating "threatens or has some direct effect on . . . the health or welfare of the [T]ribe." Thus, the Tribe retains inherent sovereign power to impose its

building, health, and safety regulations on appellee's business, notwithstanding appellee's ownership in fee of the land on which the store stands.[4]

In addition to reading Oliphant as precluding civil, as well as crimimal, jurisdiction by Indians over non-Indians, the district court expressed the belief that "the exercise of general tribal power over non-Indians raises enormous constitutional problems" because it

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4. Appellee appears not to recognize the existence of inherent tribal sovereignty. He asserts on appeal that "Indian tribes completely surrendered up their sovereignty and became complete dependents upon the sovereign federal government," Appellee's Brief at 9, and that "[t]he total extent of the tribe's recognized governmental powers" must be traced, explicitly or implicitly, to the provisions of the treaty by which the federal government recognized the Tribe. Id. at 19. These assertions are incorrect. Indian tribes, which were originally fully sovereign, are now dependent on the United States, but nevertheless "still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." United States v. Wheeler, 435 U.S. 313, 323 (1978).

contradicts "[t]he constitutional principle central to our notion of political justice"--namely, "government by the consent of the governed." Order Granting Injunctive Relief, at 8. The Supreme Court, in upholding a tribe's right to tax non-Indian enterprises operating on the reservation, recently answered this concern: "Whatever place consent may have in contractual matters and in the creation of democratic governments, it has little if any role in measuring the validity of an exercise of legitimate sovereign authority." Merrion v. Jicarilla Apache Tribe, 50 U.S.L.W. 4169, 4173-74 (U.S. January 25, 1982). Since, as explained above, the Tribe's regulation of appellee's business is "an exercise of legitimate sovereign authority," it cannot be overturned because of appellee's non-consent.[5]

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5. Appellee argues that the General Allotment Act of 1887, ch. 119, 24 Stat. 388, implies that non-Indian purchasers of allotted land cannot be subjected to tribal jurisdiction. He has failed to point to any support for this claim, and we reject it. Indeed, in 1905, during the heyday of

For the foregoing reasons, we reverse the judgment of the district court and

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> the allotment policy, the Eighth Circuit held that an Indian tribe retained the power to tax non-Indians despite their acquisition of land and incorporation of towns and cities:
>
> Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders by the existence of towns and cities therein endowed with the usual powers of municipalities, nor by the ownership nor occupancy of the land within its territorial jurisdiction by citizens or foreigners. . . . The theory that the consent of a government to . . . the conveyance of the title to lots or lands within [its territory] to private individuals exempts . . . the owners or occupants of such lots from the exercise of all its governmental powers, . . ., is too unique and anomalous to invoke assent.

Buster v. Wright, 135 F. 947, 952 (8th Cir.), appeal dismissed, 203 U.S. 384 (1905). Buster is cited approvingly in Merrion v. Jicarilla Apache Tribe, 50 U.S.L.W. 4169, 4172-73 (U.S. January 25, 1982).

hold that the Tribe has the power to enforce its building, health, and safety regulations against appellee's business. REVERSED and REMANDED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JOHN C. CARDIN and NANCY L. CARDIN,	)	
Plaintiffs,	)	CIVIL NUMBER C79-1184M
v.	)	ORDER GRANTING INJUNCTIVE
JOSEPH DE LA CRUZ, et al.,	)	RELIEF
Defendants.	)	

The Court has reviewed plaintiff's Motion for Preliminary Injunction and For Temporary Restraining Order, defendants' Motion to Dismiss, all submissions of the parties and amicus curiae relating thereto, the Report and Recommendation of United States Magistrate John L. Weinberg, and the balance of the record herein. The Court, being fully advised, finds that plaintiffs' Motion for Injunctive Relief must be granted, and defendants' Motion to Dismiss should be denied.

This is an action for declaratory and injunctive relief brought by non-Indian plaintiff as the owner of certain fee property located in the town of Queets,

Jefferson County, Washington, and within the geographic description of the Quinault Indian Reservation. Plaintiff operates a store and a group of rental cabins on his property. The tribe is attempting to enforce against plaintiff certain building, health and safety regulations promulgated by the tribe. Plaintiff brings this action to enjoin enforcement of those regulations. Defendants are the tribal chief, a judge of the tribal court, the tribal police chief, and named members of the tribal business committee.

II. BACKGROUND

In October of 1978, plaintiff purchased a 30 acre parcel which included the Queets Store, not then in operation. At the time of purchase, plaintiff met with tribal officials and discussed what repairs and improvements were deemed necessary by the tribe before the store reopened. Plaintiff reopened the store in May of 1979 without repairing the alleged deficiencies in the property. In June of 1979, the tribe sought and obtained an injunction in tribal court directing plaintiff to close the store

until he had obtained a "certificate of occupancy" in accordance with the Quinault Tribal Code. When plaintiff refused to do so, tribal law enforcement officers forcibly closed the store. After four days, plaintiff obtained a temporary certificate of occupancy, and reopened the store. When further repairs were not made to the tribe's satisfaction, it again brought suit in tribal court in September of 1979 seeking another injunction against further operation of the store. Plaintiff then brought this action challenging the jurisdiction of the tribe and the tribal court to regulate the operation of his business.

The tribe agreed to defer action in tribal court with leave to reactivate that case upon notice to plaintiff. The tribe subsequently gave notice, and proposed to proceed in tribal court on February 28, 1980. Upon receiving that notice plaintiff moved in this Court for a temporary restraining orde to block any action by the tribe to close his store again. The tribe postponed action in tribal court until April 11, 1980. At

that time, the tribal court granted the tribe a preliminary injunction enjoining operation of plaintiff's Queets Store until further order of the tribal court. Plaintiff was served with the injunction on April 14, 1980. The store closed that same day and remains closed as of this date.

The central issue on the merits of the case is whether the tribe has jurisdiction to regulate activities by non-Indians on fee patent land within the reservation. Plaintiff vigorously maintains that as a non-Indian he is not amenable to tribal court jurisdiction nor subject to civil regulatory procedures drawn by the tribe pursuant to self-government policies. Further, plaintiff contends that defendants' exercise of power of the tribal court and tribal police to forcibly close plaintiff's business to compel compliance with tribal regulations constitutes a deprivation of property without due process of law, thereby violating plaintiff's constitutional and civil rights and invoking federal question jurisdiction. Defendants have moved to dismiss the complaint,

asserting that this Court lacks subject matter jurisdiction, and that defendants enjoy sovereign immunity from the claims asserted in this action.

II. FEDERAL INDIAN LAW: THE OLIPHANT DECISION

This Court on two occasions has spoken specifically on the issue of the immunity of non-Indians from tribal jurisdiction. Trans-Canada Enterprises, Ltd. v. Muckleshoot Indian Tribe, et al., C77-882M (W.D. Wash. July 27, 1978, Nov. 3, 1978); Sechrist v. Quinault Indian Nation, et al., C76-823M (W.D. Wash. August 7, 1979). However, case law on this issue is indeed sparse.

It is clear that on tribal-owned property, the tribe may make rules and regulations for the use of that land. A tribe is, however, with respect to its reservation, more than merely a private owner. Tribes possess "attributes of sovereignty over both their members and their territory...." United States v. Wheeler, 435 U.S. 313, 323 (1978). These attributes spring from "inherent powers of limited sovereignty which have never been extinguished." F. Cohen, Handbook

of Federal Indian Law, (1945) 122. However, this limited sovereignty does not of necessity embrace the exclusive power to regulate the activities of non-member property owners within the reservation. United States and Crow Tribe v. State of Montana, et al., 604 F.2d 1162 (9th Cir., 1979).

A tribe's sovereignty is limited as "it exists only at the sufferance of Congress and is subject to complete defeasance." Wheeler at 323. It does not include, for example, criminal jurisdiction over non-Indians. Oliphant Suquamish Indian Tribe, 435 U.S. 191 (1978). Moreover, as the Supreme Court in Oliphant observed:

> "Indian reservations are "a part of the territory of the United States.' United States v. Rogers, 4 How. 567, 571, (1846). Indian tribes 'hold and occupy [the reservations] with the assent of the United States, and under their authority.' Id., at 572. Upon incorporation into the territory of the United States, the Indian tribes thereby come under the territorial sovereignty of

> the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty. '[T]heir rights to complete sovereignty, as independent nations, [are] necessarily diminished.' Johnson v. M'Intosh, 8 Wheat. 543, 574 (1823)."

Oliphant at 208-209.

The Oliphant case is one of the few recent occasions on which the Supreme Court has addressed the issue of federal Indian policy. The Court's discussion is of particular relevance and guidance in deciding the questions posed in the case at bar. Oliphant presented the Court with the issue of the propriety of tribal criminal jurisdiction over non-Indians in the absence of congressional authorization. Since Congress had not expressly taken away its power to prosecute non-Indians, the tribe argued it retained such power as part of its inherent sovereignty. The issue was therefore framed to turn on the distinction of whether tribes exercise inherent or delegated power in the absence of a governing

treaty or congressional act. Thus, without statutory or treaty provisions upon which to base a decision, the Court had to define the general governing powers of a tribe.

The Court quoted a 1960 Senate Report which stated that "Indian tribal law is enforcible against Indians only; not against non-Indians.... Non-Indians are not subject to the jurisdiction of Indian courts." Oliphant at 205, quoting S. Rep. No. 1686, 86th Cong., 2d Sess. 2 (1960). The Court noted the commonly shared presumption of Congress, the Executive Branch, and lower federal courts that Indian tribes do not have jurisdiction over non-Indians, stating

> "'Indian law' draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."

Oliphant at 206.

With respect to the assumptions of the executive branch, its treaties uniformly excluded tribal civil jurisdiction over non-members. And more recently, the author of the major treatise of federal Indian law, Felix S. Cohen, acknowledged that the jurisdiction of tribal courts was limited to Indians. Handbook of Federal Indian Law, supra, 148, 382. This is of particular note in light of his significant role in the development of federal Indian law.

With these considerations in mind, the Oliphant Court characterized tribal powers as follows:

> "Indian tribes do retain elements of 'quasi-sovereign' authority after ceding their lands to the United States and announcing their dependence on the Federal Government. See Cherokee Nation v. Georgia, 5 Pet. 1, 15 (1831). But the tribes' retained powers are not such that they are limited only by specific restrictions in treaties or congressional enactments. As the Court of Appeals recognized, Indian tribes are prohibited from exer-

> cising both those powers of autonomous states that are expressly terminated by Congress and those powers 'inconsistent with their status.'"

Oliphant at 208 quoting Oliphant v. Schlie, 544 F.2d 1007, 1009, (9th Cir. 1976), (emphasis in the original). Oliphant's "inconsistent with their status" exception was later referred to by the Court as the "implicit divestiture" exception. Wheeler at 326. The Court noted two other powers previously found to be inconsistent with the tribes' status, to wit, the power to convey reservation land, Johnson v. M'Intosh, 8 Wheat 543 (1823), and the power to exercise external political sovereignty, Cherokee Nation v. Georgia, 5 Pet. 1 (1831). The Court emphasized that the intrinsic limitations on tribal authority are not restricted to these two exceptions.

In concluding that the exercise of criminal jurisdiction over non-Indians is inconsistent with the status of an Indian tribe, the Court employed the following rationale:

"Protection of territory within its external political boundaries, is, of course, as central to the sovereign interest of the United States as it is to any other sovereign nation. But from the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress. This principal would have been obvious a century ago when most Indian tribes were characterized by a 'want of fixed laws [and] of competent tribunals of justice'.... It should be no less obvious today, even though present-day Indian tribal courts embody drama-

> tic advances over their historical antecedents."

Oliphant at 209-210.

The Court went on to discuss the case of Ex Parte Crow Dog, 109 U.S. 556 (1883) which addressed the inverse of the Oliphant issue, that is, whether prior to the Major Crimes Act of 1885, Act of Mar. 3, 1885, 23 Stat. 385, now codified, as amended, 18 U.S.C. § 1153, federal courts had jurisdiction to try Indians who had offended against fellow Indians on reservation land. The Crow Dog Court concluded that criminal jurisdiction was exclusively in the tribe, observing that the United States was seeking to extend United States law

> "'...by argument and inference only,...over aliens and strangers; over the members of a community separated by race [and] tradition, ... from the authority and power which seeks to impose upon them the restraints of an external and unknown code...; which judges them by a standard made by others and not for them.... It tries them, not by their peers, nor by the customs of their

> people, nor the law of their land, but by ... a different race, according to the law of a social state of which they have an imperfect conception....'"

Oliphant at 210-211, quoting 109 U.S. at 571. As the Oliphant Court recognized, these same consideration, when applied to the non-Indian rather than the Indian offender, articulate an equally compelling argument against the validity of the tribe's contention that Indian tribes, absent afirmative congressional legislation to the contrary, retain the power to try non-Indians according to their own customs and procedures even though Indian tribes are fully subordinated to the sovereignty of the United States. Such an exercise of tribal jurisdiction over non-Indian citizens of the United States "would belie the tribes' forfeiture of full sovereignty in return for the protection of the United States", Oliphant at 211, and ignores that

> "'Indians are within the geographical limits of the United States. The soil and people within these limits are under the political control of the Gov-

> ernment of the United States, or of the States of the Union. There exist in the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they... exist in subordination to one or the other of these.' United States v. Kagama, 118 U.S. 375, 379 (1886)."

Oliphant at 211. And finally, the Oliphant Court recognized that it is for Congress to decide whether Indian tribes should finally be authorized to try non-Indians, and that the considerations pertinent to that determination have little relevance to the principles which guided the court to its ultimate holding that "Indian tribes do not have inherent jurisdiction to try and to punish non-Indians." Oliphant at 212.

III. FEDERAL JURISDICTION

As the Court implies in Oliphant at 211, the exercise of general tribal power over non-Indians raises enormous constitutional problems. The constitutional principal central to our notion of political justice is government by the

consent of the governed. Nevada v. Hall, 440 U.S. 410, 426 (1979). The assertion of tribal civil regulatory power and jurisdiction over non-Indians would deprive them of basic civil liberties. Yet, if tribal power is limited to members, no problem emerges.

Often tribes base their assertion of civil regulatory jurisdiction over non-Indians on a perceived need to protect their members and their property. See Defendants' "Response to Objections to Magistrates' Report," March 7, 1980, page 3. This position overlooks the fact that tribal property is already protected under state and federal law to the same extent as is property owned by others, and that state and federal civil and criminal jurisdiction over non-Indians is complete.

Plaintiff challenges the tribe's assertion of civil regulatory power on the basis of a denial of the fundamental rights guaranteed him by the Constitution and the laws of the United States. Plaintiff claims immunity from such tribal jurisdiction on the basis of the overriding sovereignty of the United

States, and the tribe's dependent status as established by treaty. Plaintiff also seeks monetary damages and such further and additional relief as the Court may deem necessary and proper under the circumstances. Although plaintiff's complaint does not state with specificity an amount in controversy, the Court is satisfied that the federal jurisdictional amount is met, considering the injunctive nature of the case and the value of the property rights sought to be protected. Therefore, the Court finds that plaintiff has alleged a claim that raises a substantial federal question. 28 U.S.C. 1331(a).

As to the next issue raised by defendants' motion to dismiss, defendants assert that the jurisdiction of this Court over them is barred by the doctrine of sovereign immunity. One of the bases of plaintiff's complaint is the allegation that defendants acted beyond the scope of their authority which extends only to concerns related to self-government of the tribe and its members. Where the officer's powers are limited, his actions beyond those limitations are

considered individual and not sovereign actions. Such actions are ultra vires his authority, and therefore may be the object of specific relief. Sturdevant v. Wilbur, 456 F. Supp. 428, 432 (D.E.D. Wisc. 1978), citing Larson v. Domestic and Foreign Commerce Corporation, 337 U.S. 682, 689 (1949). See also Ex Parte Young, 209 U.S. 123 (1908). In any event, an officer of the tribe is not protected by the tribe's immunity from suit. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59 (1978). Therefore, the Court finds that defendants' motion to dismiss must be denied.

And further, the Court finds, in light of Oliphant, that the tribe's power of self-government to regulate the internal and social relations of its members does not extend to non-Indian plaintiff. The exercise of tribal government that intrudes without warrant in the basic property rights guaranteed to plaintiff under the United States Constitution is inconsistent with tribal status. Since a power inconsistent with tribal status can only be exercised "in a manner acceptable to Congress," Oliphant

at 210, the Quinault tribe is therefore restricted to the exclusive exercise of delegated powers in governing the activities of non-Indian plaintiff on his property. The Court finds no such delegated powers to exist to allow the tribe to enforce its regulations on plaintiff in the instant action. In light of the foregoing, NOW, THEREFORE,

IT IS ORDERED, ADJUDGED and DECREED that

(1) Defendants' Motion to Dismiss is hereby DENIED:

(2) Plaintiff's Motion for a Preliminary Injunction is hereby GRANTED.

DATED this 29th day of May, 1980.

/s/ Walter T. McGovern
WALTER T. McGOVERN, Chief United States District Judge

APPENDIX C

UNITED STATES CONSTITUTION

ARTICLE I, SECTION 8, CLAUSE 3. REGULATION OF COMMERCE

To regulate commerce with foreign nations, and among the several States, and with the Indian Tribes;

AMENDMENT V - CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV. - CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of any citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial

officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove

such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX D

TREATY WITH THE QUINAIELT, ETC., 1855.

ARTICLE 1. The said tribes and bands hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows: Commencing at a point on the Pacific coast, which is the southwest corner of the lands lately ceded by the Makah tribe of Indians to the United States, and running easterly with and along the southern boundary of the said Makah tribe to the middle of the coast range of mountains; thence southerly with said range of mountains to their intersection with the dividing ridge between the Chehalis and Quiniatl [sic] Rivers; thence westerly with said ridge to the Pacific coast; thence northerly along said coast to the place of beginning.

ARTICLE 2. There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington,

to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the meantime it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant. If necessary for the public convenience, roads may be run through said reservation, on compensation being made for any damage sustained thereby.

ARTICLE 3. The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting,

gathering roots and berries, and pasturing their horses on all open and unclaimed lands. Provided, however, That they shall not take shell-fish from any beds staked or cultivated by citizens; and provided, also, that they shall alter all stallions not intended for breeding, and keep up and confine all stallions themselves.

ARTICLE 4. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of twenty-five thousand dollars, in the following manner, that is to say: For the first year after the ratification hereof, two thousand five hundred dollars; for the next two years, two thousand dollars each year; for the next three years, one thousand six hundred dollars each year; for the next four years, one thousand three hundred dollars each year; for the next five years, one thousand dollars each year; and for the next five years, seven hundred dollars each year. All of which sums of money shall be applied to the use and benefit of the said Indians under the directions of the President of the United States,

who may from time to time, determine at his discretion upon what beneficial objects to expend the same; and the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

ARTICLE 5. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

ARTICLE 6. The President may hereafter, when in his opinion the interest of the Territory shall require, and the welfare of the said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them

with other friendly tribes or bands, in which later case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor.

ARTICLE 7. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of the individuals.

ARTICLE 8. The said tribes and bands acknowledge their dependence on the

Government of the United States, and promise to be friendly with all citizens thereof, and pledge themselves to commit no depredations on the property of such citizens; and should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the Government out of their annuities. Nor will they make war on any other tribe except in self-defense, but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision and abide thereby; and if any of the said Indians commit any depredations on any other Indians within the Territory, the same rule shall prevail as is prescribed in this article in case of depredations against citizens. And the said tribes and bands agree not to shelter or conceal offender against the laws of the United States, but to deliver them to the authorities for trial.

ARTICLE 9. The above tribes and bands are desirous to exclude from their

reservations the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging to said tribes who is guilty of bringing liquor into said reservations, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her, for such time as the President may determine.

ARTICLE 10. The United States further agree to establish at the general agency for the district of Puget Sound, within one year from the ratification hereof, and to support for a period of twenty years, an agricultural and industrial school, to be free to the children of the said tribes and bands in common with those of the other tribes of said district, and to provide the said school with a suitable instructor or instructors, and also to provide a smithy and carpenter's shop, and furnish them with the necessary tools, and to employ a blacksmith, carpenter, and farmer for a term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said

central agency, who shall furnish medicine and advice to their sick, and shall vaccinate them; the expenses of the said school, shops, employees, and medical attendance to be defrayed by the United States, and not deducted from their annuities.

ARTICLE 11. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE 12. The said tribes and bands finally agree not to trade at Vancouver's Island or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside on their reservations without consent of the superintendent or agent.

ARTICLE 13. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians, have hereunto set their hands and seals,

at Olympia, January 25, 1856, and on the Qui-nai-elt River, July 1, 1855.

Isaac I. Stevens, Governor and Sup't of Indian Affairs.

APPENDIX E

QUINAIELT RESERVE.

EXECUTIVE MANSION,
November 4, 1873.

In accordance with the provisions of the treaty with the Quinaielt and Quillehute Indians, concluded July 1, 1855, and January 25, 1856 (Stats. at Large, vol. 12, p. 971), and to provide for other Indians in that locality, it is hereby ordered that the following tract of country in Washington Territory (which tract includes the reserve selected by W. W. Miller, superintendent of Indian affairs for Washington Territory, and surveyed by A. C. Smith, under contract of September 16, 1861) be withdrawn from sale and set apart for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific coast, viz: Commencing on the Pacific coast at the southwest corner of the present reservation, as established by Mr. Smith in his survey under contract with Superintendent Miller, dated September 16, 1861; thence due east, with the line of said survey, 5

miles to the southeast corner of said reserve thus established; thence in a direct line to the most southerly end of Quinaielt Lake; thence northerly around the east shore of said lake to the northwest point thereof; thence in a direct line to a point a half mile north of the Queetshee River and 3 miles above its mouth; thence with the course of said river to a point on the Pacific coast, at low-water mark, a half mile above the mouth of said river; thence southerly, at low-water mark, along the Pacific to the place of beginning.

U. S. Grant

APPENDIX F

24 Stat. 388

CHAP. 119. - An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of American in Congress assembled, That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon

in quantifies as follows:

To each head of a family, one-quarter of a section;

To each single person over eighteen years of age, one-eighth of a section;

To each orphan child under eighteen years of age, one-eighth of a section; and

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: Provided, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: And provided further, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservations,

shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: And provided further, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: Provided, That if any one entitled to an allotment shall fail to make a selection within four

years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

Sec. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

SEC. 4. That where any Indian not residing upon a reservation, or for whose

tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General

Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allocated, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made

touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time

to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: Provided however, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: And provided further, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the

same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied,

on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes [sic] in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments

shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and

no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

SEC. 10. That nothing in this act

contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

Approved, February 8, 1887.

GENERAL ALLOTMENT ACT

25 U.S.C. 331 et seq.

§ 331. Allotments on reservations; irrigable and nonirrigable lands

In all cases where any tribe or band of Indians has been or shall be located upon any reservation created for their use by treaty stipulation, Act of Congress, or Executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allot-

ments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest, not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of nonirrigable agricultural land and four times the number of acres of nonirrigable grazing land: Provided, That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: Provided further, That where a treaty or Act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act, subject, however, to the basis of equalization between irrigable and nonirrigable lands established herein, but in such cases allotments may be made in quantity as specified herein,

with the consent of the Indians expressed in such manner as the President in his discretion may require.

§ 332. Selection of allotments

All allotments set apart under the provisions of sections 331-334, 339, 341, 342, 348, 349 and 381 of this title shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under said sections: Provided, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the

Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

§ 333. Making of allotments by agents

The allotments provided for in sections 331-334, 339, 341, 342, 348, 349 and 381 of this title, shall be made by special agents appointed by the President for such purpose, and the superintendents or agents in charge of the respective reservations on which the allotments are directed to be made, or, in the discretion of the Secretary of the Interior, such allotments may be made by the superintendent or agent in charge of such reservation, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such special allotting agents, superintendents, or agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the

Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the Bureau of Land Management.

§ 334. Allotments to Indians not residing on reservations

Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or Executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in sections 331-334, 339, 341, 342, 348, 349 and 381 of this title for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as provided in sections 348

and 349 of this title. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Secretary of the Interior or such officer as he may designate, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

§ 335. Extension of provisions as to allotments

Unless otherwise specifically provided, the provisions of sections 331-334, 339, 341, 342, 348, 349, and 381 of this title are extended to all lands heretofore purchased or which may be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians.

§ 336. Allotments to Indians making settlement

Where any Indian entitled to allotment under existing laws shall make

settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children in manner as provided by law for allotments to Indians residing upon reservations, and such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper, not to exceed, however, forty acres of irrigable land or eighty acres of nonirrigable agricultural land or one hundred sixty acres of nonirrigable grazing land to any one Indian; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto, and patent shall be issued to them for such lands in the manner and with the restrictions provided in sections 348 and 349 of this title. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general

laws for the disposition of the public lands shall be paid to them from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Secretary of the Interior or such officer as he may designate, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

§ 337. Allotments in national forests

The Secretary of the Interior is authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws, to any Indian occupying, living on, or having improvements in land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture who shall determine whether

the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided.

§ 337a. San Juan County, Utah; discontinuance of allotments

No further allotments of lands to Indians on the public domain shall be made in San Juan County, Utah.

§ 338. Repealed. May 29, 1928, c. 901, § 1(64), 45 Stat. 991

§ 339. Tribes excepted from certain provisions

The provision of sections 331-334, 341, 342, 348, 349, and 381 of this title shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in Oklahoma, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska

adjoining the Sioux Nation on the south added by Executive order.

§ 340. Extension of certain provisions

The provisions of sections 331-334, 349, 341, 342, 348, 349, and 381 of this title, are declared to extend to and are made applicable to the Confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians, and the Western Maimi tribe of Indians, located in the northeastern part of the Indian Territory and to their reservation, in the same manner and to the same extent as if said tribes had not been excepted from the provisions of said sections, except and as otherwise on and after March 2, 1889, provided.

§ 341. Power to grant rights-of-way not affected

Nothing in sections 331-334, 339, 342, 348, 349, and 381 of this title shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making

just compensation.

§ 342. Removal of Southern Utes to new reservation

Nothing in sections 331-334, 339, 341, 348, 349, and 381 of this title, shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe.

§ 343. Correction of errors in allotments and patents

In all cases where it shall appear that a double allotment of land has been wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been made in the description of the land inserted in any patent, said Secretary is authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian, and for which a conditional patent may have been issued, to rectify and correct such mistakes and cancel any patent which may

have been thus erroneously and wrongfully issued whenever in his opinion the same ought to be canceled for error in the issue thereof, and if possession of the original patent can not be obtained, such cancellation shall be effective if made upon the records of the Bureau of Land Management; and no proclamation shall be necessary to open to settlement the lands to which such an erroneous allotment patent has been canceled, provided such lands would otherwise be subject to entry: And provided, That such lands shall not be open to settlement for sixty days after such cancellation: And further provided, That no conditional patent that has been or that may be executed in favor of any Indian allottee, excepting in cases hereinbefore authorized, and excepting in cases where the conditional patent is relinquished by the patentee or his heirs to take another allotment, shall be subject to cancellation without authority of Congress.

§ 344. Cancellation of allotment of unsuitable land

If any Indian of a tribe whose surplus lands have been ceded or opened to

disposal has received an allotment embracing lands unsuitable for allotment purposes, such allotment may be canceled and other unappropriated, unoccupied, and unreserved land of equal area, within the ceded portions of the reservation upon which such Indian belongs, allotted to him upon the same terms and with the same restrictions as the original allotment, and lands described in any such canceled allotment shall be disposed of as other ceded lands of such reservation. This provision shall not apply to the lands formerly comprising Indian Territory. The Secretary of the Interior is authorized to prescribe rules and regulations to carry this law into effect.

§ 344a. Cancellation of patent issued to Indian allottee dying without heirs

The Secretary of the Interior is authorized to investigate the allotment in the name of any deceased Indian and if it be shown to his satisfaction that the allottee died without heirs he shall report the facts to Congress with a recommendation for the cancellation of the patent issued in the name of such

Indian.

§ 345. Actions for allotments

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of

any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands held August 15, 1894, by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of appeal shall be allowed to either party as in other cases.

§ 346. Proceedings in actions for allotments

The plaintiff shall cause a copy of his petition filed under section 345 of this title, to be served upon the United States attorney in the district wherein suit is brought, and shall mail a copy of same, by registered letter, to the Attorney General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the United States attorney upon whom service of petition is made as aforesaid to appear and defend

the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises: Provided, That should the United States attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.

§ 347. Limitations of actions for lands patented in severalty under treaties

In all actions brought in any State court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of

lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situate shall be held to apply, and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians.

§ 348. Patents to be held in trust; descent and partition

Upon the approval of the allotments provided for in sections 331-334 of this title, by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to

whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided: And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of

the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: Provided, however, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, sub-

ject to grants which Congress may make in aid of education: And provided further, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years' occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at 3 per centum per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the Bureau of Land Management, and afterwards delivered, free of charge, to the allottee entitled thereto. And if any religious society or

other organization was occupying on February 8, 1887, any of the public lands to which sections 331-334, 339, 341, 342, 348, 349, and 381 of this title are applicable, for religious or educational work among the Indians, the Secretary of the Interior is authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And in the employment of Indian police, or any other employees in the public service among any of the Indian tribes or bands affected by the aforementioned sections, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of the said sections and become citizens of the United States shall be preferred.

Provided further, That whenever the Secretary of the Interior shall be satisfied that any of the Indians of the

Siletz Indian Reservation, in the State of Oregon, fully capable of managing their own business affairs, and being of the age of twenty-one years or upward, shall, through inheritance or otherwise, become the owner of more than eighty acres of land upon said reservation, he shall cause patents to be issued to such Indian or Indians for all of such lands over and above the eighty acres thereof. Said patent or patents shall be issued for the least valuable portions of said lands, and the same shall be discharged of any trust and free of all charge, incumbrance, or restriction whatsoever, and the Secretary of the Interior is authorized and directed to ascertain, as soon as shall be practicable, whether any of said Indians of the Siletz Reservation should receive patents conveying in fee lands to them under the provisions of sections 331-334, 339, 341, 342, 348, 349, and 381 of this title.

§ 348 a. Same; extension of trust period for Indians of Klamath River Reservation

The period of trust on lands allotted to Indians of the Klamath River Reser-

vation, California, which expired July 31, 1919, and the legal title to which is still in the United States, is hereby reimposed and extended for a period of twenty-five years from July 31, 1919: Provided, That further extension of the period of trust may be made by the President in his discretion, as provided by section 348 and section 391 of this title.

§ 349 Patents in fee to allottees

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: Provided, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or

her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: And provided further, That the provisions of sections 331-334, 339, 34., 342, 349 and 381 of this title shall not extend to any Indians in the Indian Territory.

§ 350. Surrender of patent, and selection of other land

The Secretary of the Interior is authorized, in his discretion, and whenever for good and sufficient reason he shall consider it to be for the best interest of the Indians, in making allotments under sections 331-334, 339, 341, 342, 348, 349 and 381 of this title, to permit any Indian to whom a patent has been issued for land on the reservation

to which such Indian belongs, under treaty or existing law, to surrender such patent with formal relinquishment by such Indian to the United States of all his or her right, title, and interest in the land conveyed thereby, properly indorsed thereon, and to cancel such surrendered patent: Provided, That the Indian so surrendering the same shall make a selection, in lieu thereof, of other land and receive patent therefor, under the provisions of said sections.

§ 351. Patents with restrictions for lots in villages in Washington

The Secretary of the Interior is authorized, whenever in his opinion it shall be conducive to the best welfare and interest of the Indians living within any Indian village on any of the Indian reservations in the State of Washington, to issue a patent to each of said Indians for the village or town lot occupied by him, which patent shall contain restrictions against the alienation of the lot described therein to persons other than members of the tribe, except on approval of the Secretary of the Interior; and if any such Indian shall die subsequent to

June 25, 1910, and before receiving patent to the lot occupied by him, the lot to which such Indian would have been entitled if living shall be patented in his name and shall be disposed of as provided for in section 372 of this title.

§ 352. Cancellation of trust patents within power or reservoir sites

The Secretary of the Interior, after notice and hearing, is authorized to cancel trust patents issued to Indian allottees for allotments within any power or reservoir site and for allotments or such portions of allotments as are located upon or include lands set aside, reserved, or required within any Indian reservation for irrigation purposes under authority of Congress: Provided, That any Indian allottee whose allotment shall be so canceled shall be reimbursed for all improvements on his canceled allotment, out of any moneys available for the construction of the irrigation project for which the said power or reservoir site may be set aside: Provided further, That any Indian allottee whose allotment, or part thereof, is so canceled shall be allotted land of equal value within the

area subject to irrigation by any such project.

§ 352a. Cancellation of patents in fee simple for allotments held in trust

The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: Provided, That the patentee has not mortgaged or sold any part of the land described in such patent: Provided also, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued.

§ 352b. Same; partial cancellation; issuance of new trust patents

Where patents in fee have been issued for Indian allotments, during the trust period, without application by or consent

of the patentees, and such patentees or Indian heirs have sold a part of the land included in the patents, or have mortgaged the lands or any part thereof and such mortgages have been satisfied, such lands remaining undisposed of and without incumbrance by the patentees, or Indian heirs, may be given a trust patent status and the Secretary of the Interior is, on application of the allottee or his or her Indian heirs, hereby authorized, in his discretion, to cancel patents in fee so far as they cover such unsold lands not encumbered by mortgage, and to cause new trust patents to be issued therefor, to the allottees or their Indian heirs, of the form and legal effect as provided by sections 348 and 349 of this title, such patents to be effective from the date of the original trust patents, and the land shall be subject to any extensions of the trust made by Executive order on other allotments of members of the same tribe, and such lands shall have the same status as though such fee patents had never been issued: Provided, That this section and section 352a of this title shall not apply where any such lands have been sold

for unpaid taxes assessed after the date of a mortgage or deed executed by the patentee or his heirs, or sold in execution of a judgment for debt incurred after date of such mortgage or deed, and the period of redemption has expired.

§ 352c. Reimbursement of allottees or heirs for taxes paid on lands patented in fee before end of trust

The Secretary of the Interior is hereby authorized, under such rules and regulations as he may prescribe, to reimburse Indian allottees, or Indian heirs or Indian devisees of allottees, for all taxes paid, including penalties and interest, on so much of their allotted land as have been patented in fee prior to the expiration of the period of trust without application by or consent of the patentee: Provided, That if the Indian allottee, or his or her Indian heirs or Indian devisees, have by their own act accepted such patent, no reimbursement shall be made for taxes paid, including penalties and interest, subsequent to acceptance of the patent: Provided further, That the fact of such

acceptance shall be determined by the Secretary of the Interior.

In any case in which a claim against a State, county, or political subdivision thereof, for taxes collected upon such lands during the trust period has been reduced to judgment and such judgment remains unsatisfied in whole or in part, the Secretary of the Interior is authorized, upon reimbursement by him to the Indian of the amount of taxes including penalties and interest paid thereon, and upon payment by the judgment debtor of the costs of the suit, to cause such judgment to be released: Provided further, That in any case, upon submission of adequate proof, the claims for taxes paid by or on behalf of the patentee or his Indian heirs or Indian devisees have been satisfied, in whole or in part, by the State, county, or political subdivision thereof, the Secretary of the Interior is authorized to reimburse the State, county, or political subdivision for such amounts as may have been paid by them.

§ 353. Sections inapplicable to certain tribes

The provisions of sections 337, 351, 352, 372, 373, 403, 406, 407, and 408 of this title shall not apply to the Osage Indians, nor to the Five Civilized Tribes, in Oklahoma. Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or Act of Congress, to a person who had died, or who dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life.

§ 354. Lands not liable for debts prior to final patent

No lands acquired under the provisions of sections 331-334 of this title shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor.

§ 355. Laws applicable to lands of full-blooded members of Five Civilized Tribes

The lands of full-blooded members of any of the Five Civilized Tribes are made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character.

§ 356. Allowance of undisputed claims of restricted allottees of Five Civilized Tribes

No undisputed claims to be paid from individual moneys of restricted allottees, or their heirs, or uncontested agricultural and mineral leases (excluding oil and gas leases) made by individual restricted Indian allottees, or their heirs, shall be forwarded to the

Secretary of the Interior for approval, but all such undisputed claims or uncontested leases (except oil and gas leases) shall be paid, approved, rejected, or disapproved by the Superintendent for the Five Civilized Tribes of Oklahoma: Provided, however, That any party aggrieved by any decision or order of the Superintendent for the Five Civilized Tribes of Oklahoma may appeal from the same to the Secretary of the Interior within thirty days from the date of said decision or order.

§ 357. Condemnation of lands under laws of States

Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

§ 358. Repeal of statutory provisions relating to survey, classification, and allotments which provide for repayment out of Indian moneys

Any and all provisions contained in any Act passed prior to March 7, 1928,

for the survey, resurvey, classification, and allotment of lands in severalty under sections 331 and 334 of this title, which provide for the repayment of funds appropriated proportionately out of any Indian moneys held in trust or otherwise by the United States and available by law for such reimbursable purposes, are hereby repealed: Provided further, That the repeal hereby authorized shall not affect any funds authorized to be reimbursed by any special Act of Congress wherein a particular or special fund is mentioned from which reimbursement shall be made.

APPENDIX G

IN THE TRIBAL COURT OF THE
QUINAULT INDIAN NATION

QUINAULT INDIAN NATION,	)	
	)	
Plaintiff,	)	FINDINGS OF FACT,
	)	
vs.	)	CONCLUSIONS OF LAW AND
	)	
JOHN CARDIN, doing business as the Queets Store,	)	PRELIMINARY INJUNCTION
	)	
	)	
Defendant.	)	
	)	

This case came on for hearing on April 11, 1980 before the undersigned judge of this Court upon Plaintiff's motion for a preliminary injunction. Michael O'Connell has appeared for Plaintiff. Defendant has not entered an appearance. Defendant has been served with the summons and complaint in this action and has been notified of this hearing. By letter received from Defendant's attorney, James Davenport, the Court has been informed that the Defendant will not appear and defend against this motion.

Findings of Fact

1. This Court finds that it has

jurisdiction to determine this matter and to issue a preliminary injunction herein.

2. Defendant Cardin owns or claims to own property in the Village of Queets in the Quinault Reservation.

3. Queets is a traditional Indian fishing village with a population of around 250 people, of whom about 220 are Indians.

4. Defendant Cardin now operates a commercial establishment in Queets known as the Queets Store into which he invites the public.

5. Food and other items are offered for sale at the Queets Store.

6. The Queets Store was inspected by the Quinault Building Inspector who directed that repaires [sic] be made so that the Store would be a safe place in which to keep and sell food products to the public and to insure that persons entering the Store would not be exposed to an unreasonable risk to their health and safety.

7. Defendant Cardin undertook a number of repairs but has not completed them as of the last inspection of the facilities Defendant allowed the Building

Inspector to make.

8. Without completing repairs as directed by the Building Inspector, Defendant occupied and began operating the building known as the Queets Store.

9. Section 306 of the Uniform Building Code, which has been adopted by the Quinault Indian Nation, prohibits occupancy of a building until the Building Inspector has issued a Certificate of Occupancy.

10. The Building Inspector has not issued Defendant Cardin a Certificate of Occupancy [sic]

11. There is a significant risk of immediate and irreparable harm to the public health and safety if Defendant is allowed to invite the public into a building which is unsafe and in which contaminated food may be offered for sale.

12. The balance between the injury to the public and the cost to the Defendant of completing repairs and obtaining a Certificate of Occupancy clearly favors granting of a preliminary injunction.

13. Plaintiff has demonstrated that it is likely to prevail on the merits.

14. It is in the public interest

that a preliminary injunction be issued.

15. Defendant has been given proper and timely notice of Plaintiff's motion for a preliminary injunction.

Conclusions of Law

Based on the foregoing Findings of Fact, the Court makes the following conclusion of law:

A preliminary injunction should issue.

Now, Therefore, It is Ordered That

John Cardin, doing business as the Queets Store, is enjoined from operating the Queets Store until further order of this Court.

April 11, 1980
Dated

/s/ Carol Burgett
JUDGE
Quinault Tribal Court

Presented by:

Michael P. O'Connell
Reservation Attorney

IN THE TRIBAL COURT OF THE
QUINAULT INDIAN NATION

Order

TO: Wilson Wells, Chief of the Quinault Tribal Police Department

You are commanded, by the order of this Court, to serve or cause to be served a copy of the accompanying Injunction upon John Cardin in the Village of Queets, Quinault Reservation.

April 11, 1980
Dated

/s/ Carol Burgett
JUDGE
Quinault Tribal Court

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN C. CARDIN and NANCY L. CARDIN,	)	
Plaintiffs,	)	Case No. C79-1184M
v.	)	
JOSEPH DE LA CRUZ, et al.,	)	REPORT AND RECOMMENDATION ON MOTIONS TO DISMISS AND FOR INJUNCTIVE RELIEF
Defendants.	)	

INTRODUCTION

This is an action brought by a non-Indian couple living on the Quinault Indian Reservation against officials of the Quinault Indian Nation ("Tribe"). Plaintiffs operate a store and a group of rental cabins within the reservation in the town of Queets, Washington. The Tribe is attempting to enforce against plaintiffs certain building, health and safety regulations promulgated by the Tribe. Plaintiffs bring this action to enjoin enforcement of those regulations. The central issue on the merits of the

case is whether the Tribe has jurisdiction to regulate activities by non-Indians on fee patent land within the reservation. Plaintiffs have moved for a preliminary injunction and also for a temporary restraining order. Defendants have moved to dismiss the complaint on jurisdictional and sovereign immunity grounds.

SUMMARY OF RECOMMENDATIONS

For the reasons set forth below, I recommend the court conclude defendants are correct in asserting that no federal question jurisdiction has been established, and that the motion to dismiss should be granted. The court therefore need not and should not address the issue of sovereign immunity or the issue of tribal jurisdiction to impose civil regulations upon non-Indians.

FACTUAL AND PROCEDURAL BACKGROUND

The applicable facts, as set forth in the affidavits and in testimony at the hearing, include the following.

The Quinault Indian Reservation is a large, roughly triangular tract of land on the Pacific Coast of the State of Washington. While the area is largely

remote wilderness, U. S. Highway 101 crosses the reservation just inside its northern border. At the northwest corner of the reservation, where the highway crosses the Queets River, is located the Indian fishing village of Queets, one of the few towns within the reservation. The residents of Queets include about 250 Indians and 20 non-Indians.

The only store in the village, the "Queets Store," is located on fee patent land. It is a grocery and "general" store. The nearest town of any size is Forks, which is 40 miles to the north. Many of the residents of Queets trade at the store, as do a number of tourists passing on the highway. The store also sells various automobile parts and services. In addition, there are rental cabins on the property, known as the "Queets Motel." Some of these cabins apparently are currently occupied.

In September of 1978, the Tribe's building official directed a letter to the previous owner of the Queets Store, identifying over 20 alleged violations of the Tribal building code, health and safety regulations, and making four

recommendations. (See Attachment B to docket #14). The Tribe had adopted the 1976 Uniform Building Code, and certain other health and safety regulations. The previous owner did not remedy the defects to the satisfaction of the Tribe.

Plaintiffs, who are non-Indians, purchased 30 acres in Queets and within the reservation in October of 1978. This parcel included the Queets Store, which was then not in operation.

At the time of the purchase, plaintiffs met with Tribal officials and discussed what repairs and improvements were necessary before the store could be reopened. Plaintiffs in fact reopened the store in May of 1979. At no time before or since, however, have plaintiffs made the improvements and repairs deemed necessary by the Tribe.

The alleged deficiencies in the property are described in the affidavits of Thomas E. Purkey and David A. Schmit (docket #11). Mr. Purkey asserts that several of the building code violations in the store could contribute to contamination of the food offered for sale, and also constitute a fire hazard. Mr.

Schmit's affidavit, with accompanying photographs, includes a description of abandoned unlocked refrigerators which constitute a threat to the lives of children who play in the area, and garbage, scrap wood, tires, washers, dryers, abandoned stoves and other materials accumulated on various portions of the property.

In June of 1979, the Tribe sought and obtained an injunction in tribal court directing plaintiffs to close the store until they had obtained a "certificate of occupancy" in accordance with the Quinault Tribal Code. When plaintiffs refused to do so, tribal law enforcement officers forcibly closed the store.

After four days, plaintiffs obtained a temporary certificate of occupancy, and reopened the store. When further repairs were not made to the Tribe's satisfaction, it again brought suit in tribal court in September 1979 seeking another injunction against further operation of the store.

Plaintiffs then brought this action challenging the jurisdiction of the Tribe and the tribal court to regulate the

operation of their business. They seek injunctive and declaratory relief, and damages of $2,500 for the period of four days during which the Queets Store was closed by defendants.

The Tribe agreed again to defer action in tribal court, reserving the right to reactivate that case upon appropriate notice to plaintiffs. The Tribe has now given that notice, and proposes to proceed with the injunction action against plaintiffs in tribal court on February 28, 1980. Upon receiving that notice, plaintiffs moved in this court for a temporary restraining order.

In summary, therefore, the Tribe intends to move ahead in tribal court on February 28, 1980 with this action to close the store unless plaintiffs make improvements deemed necessary by the Tribe. Plaintiffs meanwhile have sought both a preliminary injunction and a temporary restraining order from this court to block that tribal action, alleging that the Tribe is without jurisdiction to regulate them.

Both sides have submitted affidavits in support of their positions. In addi-

tion, a hearing was conducted November 8, 1979 at which each party had an opportunity to cross-examine any of the persons who submitted affidavits for the opposing party.

Defendants also move to dismiss the action, asserting: (a) this court has no jurisdiction over the case, because there is no federal question involved nor any other basis for jurisdiction; and (b) defendants enjoy sovereign immunity from the claims asserted in this action.

All parties have fully briefed their positions. In addition, with leave of court, the State of Washington has submitted a brief amicus curiae, and defendants have submitted a reply to that brief.

NO FEDERAL QUESTION JURISDICTION

A. Introduction.

Before the court reaches any of the issues on the merits on any case, it must be satisfied the court has jurisdiction. Furthermore, it is plaintiffs' burden to establish that jurisdiction exists.

> "[T]he rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is

> within the competence of that court. The presumption is that a federal court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists. Thus the facts showing the existence of jurisdiction must be affirmatively alleged in the complaint." (Footnotes omitted) 13 Wright & Miller, Federal Practice and Procedure, §3522, at page 45.

We must therefore look primarily to plaintiffs' complaint, but also to the memoranda of the parties, in passing upon the motion to dismiss for lack of jurisdiction. I recommend the court conclude the complaint states no valid basis for federal court jurisdiction; and that the grounds for jurisdiction stated in plaintiffs' memoranda, even if they could be considered despite their absence from the complaint, are not valid in any event.

B. The "Well-Pleaded Complaint."

In the complaint, plaintiffs assert this court has "federal question" jurisdiction under 28 U.S.C. §1331(a). They alleged no other basis for the jurisdiction of this court. While plaintiffs

seek declaratory judgment pursuant to 28 U.S.C. §2201, defendants correctly point out that the Declaratory Judgment Act might provide an additional form of relief but does not convey jurisdiction where it does not otherwise exist. Plaintiffs do not contest this. The motion to dismiss therefore turns upon whether there is federal question jurisdiction.

The existence of federal question jurisdiction is determined by the federal courts in accordance with the so called "well-pleaded complaint rule." As explained by the U. S. Supreme Court in Phillips Petroleum Co. v. Texaco Inc., 415 U.S. 125 (1974), this means that:

> "'[A] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.' Gully v. First National Bank, 299 U.S. 109, 112 (1936). The federal questions 'must be disclosed upon the face of the complaint, unaided by the answer.' Moreover, 'the complaint itself will not avail as a basis of jurisdiction in so far as

> it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense.'" 415 U.S. at 127-128.

Plaintiffs' complaint in this case falls far short of that standard. As a preliminary matter, there is no allegation to establish that the case involves an amount exceeding $10,000 exclusive of interest and costs. Presumably this could be cured by an amendment to the complaint.

But there is a more fundamental defect. While the complaint asserts that the action arises under the Constitution, laws or treaties of the United States, nowhere is it alleged what particular Constitutional provisions, statutes or treaties are involved. The U. S. Court of Appeals for this circuit has held,

> "[F]ederal question jurisdiction is available only when the claim arises 'directly' under federal law (citations omitted)." League to Save Lake Tahoe v. B. J. J. Corp., 547 F.2d 1072, 1074 (9th Cir. 1976).

In this complaint, neither the jurisdictional recitals nor the factual alle-

gations provide any hint as to what aspect of federal law directly supports plaintiffs claim.

The complaint therefore fails adequately to allege jurisdiction, and the motion to dismiss could be granted on this ground alone.

C. Federal Law as Basis for Plaintiffs' Claims - Looking Beyond The Face of The Complaint.

Looking beyond the face of the complaint provides no further basis for federal question jurisdiction. Plaintiffs have addressed this issue in "Plaintiffs' Reply Memorandum Supporting Motion For Preliminary Injunction," docket #19. In support of this court's alleged jurisdiction, they claim the exercise of purported civil jurisdiction over them by the Tribe and its officials deprives them of life, liberty or property without due process of law, as guaranteed by the Fifth Amendment of the U. S. Constitution.

But the Fifth Amendment imposes restrictions only upon the federal government and it [sic] agencies and instrumentalities. The applicable cases

have long held that Indian tribes do not so qualify, and their actions are not subject to restriction under the Fifth Amendment. Talton v. Mayes, 163 U.S. 376 (1896); Martinez v. Southern Ute Tribe, 249 F.2d 915 (10th Cir. 1957), cert. denied 356 U.S. 960 (1958); Barta v. Oglala Sioux Tribe, 259 F.2d 553 (8th Cir. 1958 [sic], cert. denied 358 U.S. 932 (1959); and Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967). The later two cases held that the due process clause of the Fourteenth Amendment is likewise inapplicable to the actions of Indian tribes.

In a case cited by neither party, Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965), the Court of Appeals for this circuit held that Indian courts at the Fort Belknap Indian community functioned in part as a federal agency and in part as a Tribal agency. The court therefore held that actions by that particular Tribal court were federal actions for purposes of a habeas corpus statute. This holding was based upon a careful review of the specific facts relating to

the Belknap Indian community and its courts. The Court of Appals was careful to point out:

> "We confine our decision to the courts of the Fort Belknap reservation. The history of other Indian courts may call for a different ruling, a question which is not before us." 342 F.2d at 379.

The Colliflower case is therefore distinguishable on that basis. In the record before us, there is no similar history of the Quinault Tribal court to suggest that it too is in part a federal agency. It is plaintiffs' burden to establish jurisdiction, and they have not done so.

Plaintiffs also seek to support this court's jurisdiction by alleging:

> "Moreover, the issue of non-Indian Constitutional rights vis a vis Indian tribal power is very much a question arising under treaties of the United States. Indian tribes' powers are formed, at least in part, by virture of treaty." (Plaintiffs' Reply Memorandum, docket #19, page 2).

But a general assertion of this kind is far from sufficient. Neither party

has presented to the court any treaty which purportedly bears upon the rights of the parties in this case. But more importantly, there is no allegation, either in plaintiffs' complaint or in their memoranda, that the provisions of any treaty provide the basis for any of plaintiffs' claims. As noted above, plaintiffs' claim must arise directly under federal law. League to Save Lake Tahoe v. B. J. K. Corp., supra. Plaintiffs suggest no respect in which their claim rests directly or indirectly upon an Indian treaty.

In this respect, this case differs from the three cases cited by plaintiffs in support of this court's jurisdiction. In McCauley v. Makah Tribe, 128 F.2d 867 (9th Cir. 1942), plaintiff Indians brought suit against state officers to enforce fishing rights allegedly granted to the Indians in treaties with the United States. The Court of Appeals sustained federal question jurisdiction, as plaintiffs' claims arose directly under the federal treaty.

In Peters v. Malin, 111 F. 244 (C.C.N.D. Iowa, 1901), an Indian sued a

federal agent for false imprisonment. The principal issue was whether the defendant has exceeded the authority granted to him under federal statutes. Plaintiff's claim thus arose directly under federal statutes. This result was followed by the same court in Y-Ta-Tah-Wah v. Rebock, 105 F. 257 (C.C.N.D. Iowa, 1900), which was a suit against a person serving simultaneously as federal Indian agent and "medicine man."

D. Federal Questions Raised by Defendants' Responses.

While plaintiffs' claim does not arise directly under any federal law, they allege that federal questions are involved in the case because defendants rely upon treaties to sustain the jurisdiction of the Tribal courts. This allegation is inaccurate and, even if true, would be inadequate to support jurisdiction.

Defendants do not rely upon any provision of a treaty to sustain their civil jurisdiction over plaintiffs and the Queets Store. Instead, defendants assert that this jurisdiction is part of the inherent sovereignty of the tribe

over the reservation and its internal affairs, including the health and safety of its residents. The Tribe does not contend this civil jurisdiction has been conveyed to them by any federal statute or treaty. Instead, defendants assert that this jurisdiction is one which the Tribe has always possessed, and of which it has never been deprived by federal statute, treaty or otherwise. The essence of defendants position as to the treaty is stated as follows:

> "There is nothing in the treaty or the treaty process that is inconsistent with the exercise of this jurisdiction throughout the reservation for the protection of all reservation residents." (Memorandum Opposing Application for Preliminary Injunction, docket #10, at page 20).

Thus defendants do not rely upon the treaty as the source of their civil jurisdiction over plaintiffs.

Even if plaintiffs were correct in asserting that defendants relied upon treaties to establish their civil jurisdiction, this would be insufficient to provide this court federal question

jurisdiction over plaintiffs' claims. At best, this would establish only that issues of federal law would be raised by way of defenses to the complaint. Where issues of federal law arise only in connection with defenses, there is no federal question jurisdiction, even if the plaintiff anticipates those defenses and raises the issues in his complaint. 13 Wright & Miller, Federal Practice and Procedure, §3566, at page 434.

SUMMARY

Plaintiffs' complaint provides no basis for federal question jurisdiction. It does not specify the Constitutional provision, federal statute, treaty, or other provision of federal law upon which plaintiffs' claim directly rests. Nor does it allege facts to indicate that the case involves the requisite jurisdictional amount.

Plaintiffs have attempted to justify federal question jurisdiction in thier memoranda submitted to this court. They have not been successful in doing so, however, because there can be no Fifth Amendment claim for actions by an Indian tribe. No treaty provision or other

provision of federal law provides the basis of plaintiffs' claims. Plaintiffs have identified no provision of federal law upon which defendants rely in asserting civil jurisdiction over plaintiffs. Even if defendants did rely upon some federal law, this court would not have federal question jurisdiction, as those issues would arise by way of defense.

There is no federal question jurisdiction, and no other basis for this court's jursidiction has been alleged or shown by plaintiffs. Because it is plaintiffs' burden to establish jurisdiction, the motion to dismiss on this ground should be granted.

Because there is no jurisdiction, the motions for a preliminary injunction and for a temporary restraining order should be denied.

If the court concurs with this recommended disposition, the court need not and should not address the (much more interesting and difficult) issue of the scope of civil jurisdiction of the Tribe over non-Indians residing and operating a business on the reservation. Similarly, the court would not reach the other issue

presented by these motions, the alleged sovereign immunity of defendants.

A proposed form of order accompanies this Report and Recommendation.

DATED this 22 day of February, 1980.

/s/ John L. Weinberg
John L. Weinberg
United States Magistrate

[Partial Transcript, testimony of Joseph De La Cruz]

IN THE UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

- - -

JOHN C. CARDIN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. C79-1184M
	)	
JOSEPH DE LA CRUZ, et al,	)	
	)	
Defendants.	)	

- - -

TRANSCRIPT OF PROCEEDINGS in the above-entitled and -numbered cause, before John L. Weinberg, a United States Magistrate, on November 9, 1979.

APPEARANCES:

For the Plaintiff:

JAMES H. DAVENPORT
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For the Defendants:

CARL ULLMAN
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MICHAEL O'CONNELL
Attorney at Law
Seattle, Washington

JOSEPH DE LA CRUZ, defendant herein, being first duly sworn, was examined and testified as follows:

THE COURT: Mr. De La Cruz, would you state your full name for us and spell your last name?

THE WITNESS: Joseph Burton De La Cruz. Last name is spelled D-e L-a C-r-u-z.

THE COURT: And your residence address?

THE WITNESS: Post Office Box 6, Taholah, Washington.

THE COURT: Thank you. Mr. Davenport.

DIRECT EXAMINATION

BY MR. DAVENPORT:

Q Mr. De La Cruz, thank you for coming today. I have a couple of questions arising out of your affidavit and relating to the tribal constitution which you have provided as an exhibit to your affidavit.

Were you involved in the writing of that constitution?

A Very much so.

Q What capacity did you hold at the

time that the constitution was written?

A Well, the Quinault Tribe has been working on updating the constitution since 1956, and it was presented to the General Council in '56; it wasn't approved. It was presented again in 1968 after some further drafts and it wasn't approved, and then in '67, '68, '69 I was business manager of the tribe and I worked with the Business Council on the drafts of the constitution that were presented and finally adopted.

Q Perhaps you can tell us, then, the process that that constitution went through. It was actually ratified by the General Council of the tribe?

A It was work done by a drafting committee. It was presented to the Business Council for their acceptance, to pass on it, and then the Business Cuncil presented it to the General Council of the Quinault Nation, and constitution amendment has to have two-thirds majority and it was voted on by the General Council and passed by two-thirds

majority.

Q Let me just ask you a few questions about membership in the Quinault Indian Nation. How many people are currently enrolled in the Quinault Indian Nation?

A It is between 1650 and 1800. We are dealing with enrollment applications daily, almost, and there are about 1650 members now presently on the Quinault tribal roll.

Q How many of those are presently residing on the Quinault Reservation?

A Approximately between 12 and 1400 with our new housing construction. We have got 30 some more houses going in, to be built -- done in December, and we haven't had an updated census now for -- I don't recall when the last one was, but there is approximately 1600 people living on the reservation that are Quinault members or Indians married to Quinaults.

Q How many non-Indians are there living on the reservation?

A I don't recall. It is less than five percent, I know, from the last census and demographic surveys that we have

taken, and we will be working with the 1980 census people to try to get the updated demographic material on people residing on Quinault.

Q Are there any requirements of lineage or Indian blood in order to be an enrolled member of the Quinault tribe?

A Yes, there are. The Quinault Nation is made up of the seven tribes that were along the Pacific Coast, the Quileute, the Hoh, the Queets band, the Quinault, Chehalis, which was upper and lower Chehalis, Cowlitz and Chinook, and to be a member of the Quinault tribe under our present laws you have to be one-quarter of conglomerated blood or one-quarter from a descendent of one of the tribes.

Q Is there any means by which someone who has no Indian lineage may be a member of the Quinault tribe?

A I would say no. We do have an adoption; we do adopt people, but -- there's been a few people adopted, but they were descendents and I don't believe there has ever been anyone adopted that was under one-eighth degree Indian blood.

Q Are there currently any non-Indian adopted enrolled members in the tribe?

A No.

Q The General Council, then, is made up of all Indians, there are no non-Indians in that group?

A Right.

Q Is that also true of the business committee?

A Yes.

Q And the business committee is elected from the General Council?

A Yes, it is.

Q Can you tell us, then, the general responsibilities of the business committee, what activities do they perform?

A The business committee is actually like the Quinault tribe's legislative body in between meetings of the General Council. The major policy of the tribe is set by the General Council, which is the body of the people and the business committee has the responsibility of carrying on the affairs of the tribe between those meetings and it also has authority to legislate things pertaining to the

welfare of the Quinault Nation.

Q The business committee, then, passed the ordinances which are at issue in this case, the ones which the tribe has elected to assert against Mr. Cardin?

A Some of them. The process that ordinance went through -- some of those ordinances were passed several years ago, the initial uniform building code, sanitation codes, and zoning ordinance. Those were ordinances that we worked on starting back in 1965, jointly with the Quinault planning commission and some business community members on it, with the Grays Harbor community planning commission. There was over a three year period of development of those ordinances, and the business committee reviewed them, acted on them, and presented them to the General Council and they were enacted.

When we adopted a new constitution, the new constitution gave us another provision on how to enact ordinances, which really follows a pattern of what other governments do,

where we -- whether it is an ordinance from the planning commission, forestry, or whatever. They develop initial drafts in a committee, then they have to come before the business committee, and we put them through a public hearing process, and after the public hearing process we can -- the business committee has the authority either to enact an ordinance or disapprove it.

Q It would be fair to say, though, that the tribal ordinances which have been asserted against Mr. Cardin are ones which were passed by legislative bodies which had no Indian members on them?

A No, not necessarily true. Our planning commission has had non-Indians on the planning commission and that was initially where those ordinances started, the initial development. The final approval -- I don't know how you measure Indian, non-Indian. We have members that are a quarter, three-quarters white on the council, the majority of them.

Q But they are members of the tribe?

A They are members of the tribe, yes.

Q I would like to address Article V, Section 3 of the constitution and --

THE COURT: You have both your file and the Court file. Maybe you can help me recall at what point of the case that came in.

MR. DAVENPORT: It is at page 10 of the constitution. The constitution is attached to Mr. De La Cruz' affidavit.

THE COURT: Fine. I will find it from that, if you give me a minute. The page number, again, was what?

MR. DAVENPORT: Page 10.

MR. ULLMAN: Please the Court, I will hand Mr. De La Cruz a copy of the constitution, if that would be useful.

MR. DAVENPORT: Does Your Honor have it?

THE COURT: I am ready.

MR. DAVENPORT: In Section 3 of Article V of the tribe's constitution, in subsection (b) there is the following language:

"To provide for the execution

and enforcement of the laws of the Quinault Indian Nation, and to establish an independent tribal court, and to provide by law for its jurisdiction, procedures and appointment or election of its judges," and then it continues with the powers of the court there.

Q (By Mr. Davenport) Where does the tribe's power come from to create this court?

A The tribe -- Indian tribes have always had the powers and they have never been taken away from them. The Quinault tribe has always exercised some of those powers throughout -- you know, as long as we can ever recall. It's only been in the last few years -- well, ten or fifteen years, where we began to recognize the fact that we were being overrun because of confused jurisdictions and county governments, and other people ignoring things that were happening on the Indian reservation because of the confused jurisdiction. Then the Quinault people and its government recognized the fact that we had to

start implementing some of the powers that have never been taken away from an Indian government, and so it was back in the mid '60s where the tribe began to start developing the ordinances.

Initially, our courts were CFR courts under the Bureau of Indian Affairs of the United States Government, although the only authority of the tribe at that time that was exercised was recommendations made after recommended judgments.

The question you asked me -- those powers are powers that have always been within an Indian tribe. Congress has never taken them away.

Q Congress has not granted those powers?

A Has never taken them away. The tribes have never given them up either.

Q Would you say, then, that the Quinault tribe is a sovereign that has powers that it can give through constitution to its courts?

A Yes, it is. The Quinault tribe, with its treaty with the United States and the powers that it reserves for self-

government over its territory and people, I would say, yes, we have those powers and we can find nowhere where Congress has ever taken those powers away, and I am no attorney, but there are several court cases that bear that out.

Q Okay. You would say, then, that under the language of the constitution the tribe, in your opinion, is exercising the sovereign power of the tribe?

A That's right. If I might, Your Honor, I might add that there is on and off again through -- at least in my experience, the years I have been working for the tribe or its principal officers, it's off and on again, hot and cold, where the county governments and state governments have recognized those authorities and powers.

Q All right. Mr. De La Cruz, I would like to refer you to subsection (g) of that same constitutional provision of the Article V, Section 3, once again powers of the business committee, and I will quote from it:

"To engage in any business that will further the economic well being of the nation and of the members of the nation, or undertake any program or projects designed for the economic advancement of the people or the nation, and to regulate the conduct of all business activities within reservation boundaries."

Does that mean that the tribe actually does engage in its own business?

A The tribe engages in two businesses. Seafood processing plant, which initially was a co-op of the fishermen, but the tribe administers it and sees that the business is run properly, and both businesses are about four years old. It has engaged in a shake and shingle manufacturing industry. That was tied in in conjunction with some of the tribe's rehabilitation work with the slash that is left after logging.

Q Does the tribe also run a mercantile store?

A Yes, and the tribe within the last year has acquired a mercantile store

in Taholah that had a long history of not providing services to the community, the owners of that. There is a history of three or four owners in the last ten years that were not running that store -- not providing the service to the people. The original man that held the mortgage on it in 1967 or '68 offered it to the tribe. He offered it to the tribe after another buyer and finally the tribe decided that for the best interest of the community we would acquire that store and stock it so it is a service to the people, and we just purchased that within the last year.

Q Has the tribe ever contemplated placing similar business in Queets?

A. Yes, it's been discussed, and we have looked at doing that in Queets. Again, on and off for several years. One of the problems that we encounter as an Indian tribe and as an Indian nation is there is a long history of paternalism with Indian people, and it's only in the last ten years where we feel confident, whether it's a tribe running a business or some

other entrepreneur, that we can protect them. If there is any bills incurred, that we can see that they will be paid, and the business community on and off for the last five or six years -- in fact, the store in Queets almost had the same type of history as the one in Taholah, where we have people from the Queets community or their representatives requesting the tribe, at one time, to acquire the store that Mr. Cardin has. We knew the store was in such bad shape we wouldn't buy it, and we have discussed putting some type of store up there, especially in the last couple years before Mr. Cardin came in. The Kalaloch store, which is a couple of miles up the road, which is really a small store, was on and off open, and with the economy the way it is at Queets, you know, it was a definite hardship, and with the situation with the gas where you have to drive so far for groceries.

Q When there was no store at all?

A No store there at all, or when there was a store there it was very poorly

stocked.

THE COURT: May I interrupt just a minute. There were a couple aspects to that that I didn't quite understand. The first comment you made was about paternalism and being concerned about bills being paid. I didn't understand what that had to do with whether or not you opened a store in Queets.

THE WITNESS: In our discussions -- and there was a long history, you know, before the tribe really started exercising some of its authority and, of course, we have got other suits over there, where the Bureau of Indian Affairs and social people were handling the affairs and accounts of the Indian people. It ended up with the history of an Indian trading post situation, where people would charge and charge and charge and there was no way to verify it, and the Bureau of Indian Affairs would send a check to the store. That was happening all around the reservation up until about ten years ago, and it is only just recently that with some of our own

tribal divisions, with social and health services and things like this, we have been able to go through an education process with our own people and even there so called trustees were not really looking out for their best interests.

THE COURT: Then you said you looked at the possibility of buying this particular store in Queets. Did you say you decided not to do it?

THE WITNESS: Because of the condition of the store and condition of the building and we have had a history or problems with previous store owners on getting that property up to par, and the business committee felt if we are going to go into the grocery business for service up in Queets, it would be less costly to go into some new facility than to try to rehabilitate those old buildings up there.

THE COURT: Excuse me. Go ahead, Mr. Davenport.

Q (By Mr. Davenport) Mr. De La Cruz, did the business community then elect to stop pursuing its desire to put a

store in Queets when Mr. Cardin took over the store there?

A As I recall, our discussions for a store never went beyond the discussion stage. There never was no decision to put a store into Queets. It never did get out of the discussion stage.

Q Has the discussion stopped?

A No, it hasn't, and when Mr. Cardin put the store in at Queets, initially my understanding from the Queets people -- initially they were quite pleased. Again, I wasn't at either business committee meeting when Mr. Cardin came before the committee, but listened to the tapes and stuff. I felt that, you know, if he was willing to meet the requirements -- what we require even of our own people on the reservation regarding that business and stuff, it would be an asset to the community.

Q You stated the building was in substantial disrepair when you were looking at it?

A Yes.

Q. Has it been improved?

A I have only seen the outside of it.

Q Has that been improved?

A Oh, yes. There have been cedar shakes put around the building.

Q Okay.

A That's the store building. I don't see much change in the buildings behind that place.

Q I would like to refer you now, once again in the same section in the constitution, Article V, Section 3, to subsection (n), and I will quote it from the constitution:

"To condemn land or interest in land for public purposes within the boundaries of the reservation; provided that owners of the lands condemned shall be paid the fair market value of such lands and any timber or buildings thereon."

Is it your position and the tribe's position that the tribe has the power of eminent domain?

A Yes.

Q Where does that power come from?

A Again, it is the power of the tribal government that has never been taken away. It is the inherent power of a

government. We are the only one that can condemn land within the boundaries of an Indian reservation. It has never been exercised. It's a provision in our constitution, just like most governments have that provision in their constitution, if it became necessary for public purposes and the benefit of the Quinault tribe; that there is a provision in the constitution if it was necessary for the tribe to exercise that. It's never been exercised.

Q Would the providing of a mercantile store for the benefit of the tribe, as you have discussed it, be a public purpose, in your mind, for which condemnation could be utilized?

A No. The violation of bringing that thing up to code. You are talking about two different types of condemnation.

Q Yes, I understand that. We are talking about the exercise of the power of eminent domain.

A Right. And condemnation, in the sense of a building not being up to code, it is different thing, and I

think that building could be condemned.

We had a similar incident right up in that area of a condemned Jefferson County school building, and a person moved onto the property that was condemned by the county, and we went -- I think it was the previous owner of the store, wouldn't let people live in it until he brought that up to the building codes, and our building codes are no different that anyone else's.

Q The question I have is: Isn't the power of eminent domain the power of a sovereign state?

A That's right.

Q And I asked you that before, that you believe the tribe is a sovereign state?

A Yes.

THE COURT: May I ask another clarifying question? Has the tribe ever exercised or considered exercising the power of eminent domain at this particular store?

THE WITNESS: No. I believe this gentleman has been given two

waivers now to comply. In fact, we have been very lenient, and that's why we ended up in court, in tribal court or here.

THE COURT: Is that the power of eminent domain the tribe is exercising?

THE WITNESS: No, and we have never -- I imagine we could go to the point, as a government, to shut that store down for not complying. The only other area where we have ever gotten close to a point of condemnation was the Quinault tribe and the State Highway Department, where we had intergovernmental agreements between the United States and the State of Washington to put a highway through there, and they violated and broke the initial agreement, so we stopped the highway and that was exercising the power of the tribe.

Q (By Mr. Davenport) I have one question about the Office of Community Development that you referred to in your affidavit. What is that? Which office are you referring to there?

A It is one of the branches of the

Quinault Tribal Government. We have got five different divisions, and the Office of Community Development is a department that handles most of the community services.

Q So, it is a department within the tribe itself?

A Yes, it is.

Q Just one more area that I would like to ask you about. In your affidavit you speak of the town of Queets, and this is in paragraph ten of your affidavit, its location, and the fact that it is easily reached by highway, U.S. 101.

Can you tell me whether it's common for non-Indians to be on the reservation, say, in the summertime during the tourist season?

A Yes, it is, but not as much as they were ten years ago. It was very common for more people to be traveling all over that reservation. In 1969, because of some of the things that were happening, the tribe closed certain areas.

Q What about the highway itself, Highway 101?

A Highway 101, no, we haven't.

Q There are people from throughout the state that come and go on Highway 101?

A That's right.

Q Is it also true of Mr. Cardin's store?

A That's right. We maintain the position that the people that come within the boundaries of our reservation are subject to and we request that they obey our laws. Just as if I am in Seattle, I respect the City of Seattle's laws. We haven't had that many incidents. The type of nature that we are sitting before this court on, most of these things are normally negotiated out, are worked out before they get to this point, whether it be a tribal member or non-Indian.

MR. DAVENPORT: That would be all the questions I have, Your Honor.

THE COURT: Mr. Ullman.

CROSS - EXAMINATION

BY MR. ULLMAN:

Q Mr. De La Cruz, how far is it by highway from Taholah to Queets?

A Well, it is over 85 miles, if you go all the way around on the blacktop highway.

Q And are there other ways to get there?

A Yes, through the logging roads. It's about 18 miles.

Q Does the store in Queets compete with the Taholah Mercantile?

A No.

Q Is the Quinault Indian Nation trying to force Mr. Cardin out of business so that it can take over the Queets store?

A No.

MR. ULLMAN: Thank you. If it please the Court, I have written down the names of the various Indian tribes to which Mr. De La Cruz referred to and I would give that to the court reporter. No other questions.

THE COURT: Any other questions?

MR. DAVENPORT: No, Your Honor.

APPENDIX I

CONSTITUTION OF THE QUINAULT INDIAN NATION

PREAMBLE

We, the Indians of the Quinault Indian Nation, in order to establish a better tribal organization; to preserve our land base, culture and identity; to safeguard our interest and general welfare; to secure the blessings of freedom [sic] and liberty for ourselves and for our posterity; and to amend our By Laws of August 22, 1922, as amended, do hereby approve and adopt this Constitution.

ARTICLE I - SOVEREIGNTY

SECTION 1 - SOVEREIGNTY: Notwithstanding the issuance of any patent, the jurisdiction and governmental power of the Quinault Nation shall extend to: (a) all lands, resources, and waters reserved to the Quinault Nation pursuant to the Treaty of Olympia, 12 Stat. 971, established by Executive Order dated November 4, 1873 (I kapp. 923) [sic] and to all persons acting within the boundaries of those reserved lands or waters; (b) all usual and accustomed fishing grounds, open and unclaimed lands reserved for

hunting and gatherings and other lands necessary for the appropriate use of fishing and hunting grounds; and all members exercising tribal hunting, gathering and fighing [sic] rights on or off the Quinault Reservation in Quinaults usual and accustomed fighing [sic] grounds or: (c) all lands or waters held by the United States in trust or reserved by the Quinault Nation for the use and benefit of any member of the Quinault Tribe when such lands or waters are not within the boundaries of an established Indian Reservation; (d) all members of the Quinault Nation while such members are within the boundaries of the United States of America or any of its Reservations, states, territories, possessions, zones, or districts; except where such jurisdiction is expressly limited by the laws of the United States; (f) offshore marine waters for a distance concurrent with the jurisdiction of the United States.

SECTION 2 - GENERAL WELFARE: It shall be the goal of the Quinault Nation to provide for the general safety and welfare of all persons acting by the right of membership in the Quinault

Nation or acting or residing within the jurisdiction of the Quinault Nation.

ARTICLE II - ENROLLMENT

SECTION 1 - MEMBER: (a) Any person of 1/4 Quinault, Queets, Quileute, Hoh, Chinook, Chehalis, or Cowlitz blood of one of the named Tribes or combined, not a member of any other federally recognized Indian tribe. (b) any person adopted into the Nation by a majority vote of the General Council, at a regular annual meeting of that council. The ownership of trust land on the Quinault Reservation shall be an important consideration in recommending adoption, but such ownership shall not be considered a necessary or sufficient qualification or condition for a recommendation of adoption.

SECTION 2 - ENROLLMENT COMMITTEE: (a) Membership. The enrollment committee shall consist of not less than four (4), nor more than nine (9) members of the Quinault Nation, appointed by the Business Committee. (b) Duties. The enrollment committee shall: (1) accept applications for enrollment and adoption, (2) investigate all applications for enrollment and adoption, (3) approve all appli-

cations for enrollment where applicants qualify for membership in the Quinault Nation under the provisions of this Constitution. A list of all persons approved for enrollment during the interim between annual General Council meetings shall be published and posted publicly in places determined to be appropriate to inform the general membership of pending enrollment thirty (30) days prior to the next annual General Council meeting and presented by the enrollment committee to the General Council at the next annual General Council meeting, (4) recommend to the General Council for their vote, persons approved by the enrollment committee for adoption into the Quinault Nation; a list of such persons shall be posted with the pending enrollment list, (5) participate in the interviewing and hiring of an enrollment clerk, (6) issue an official notice of denial of enrollment to any person, who, after all due investigation by the enrollment committee is found not to be qualified for enrollment in the Quinault Nation, (7) issue an official notice of denial of recommendation to any person, who, after all due

investigation by the enrollment committee is found not to be acceptable for a recommendation of adoption.

SECTION 3 - APPROVED APPLICANTS: All persons approved for enrollment by the enrollment committee shall be considered members for all purposes until their names are presented at an annual General Council meeting; provided, persons approved for enrollment shall not be permitted to vote on the enrollment or adoption of any person.

SECTION 4 - APPEALS: (a) Persons denied enrollment by a final act of the enrollment committee may appeal the decision of the enrollment committee to the General Council and if denied by the General Council may appeal to the Quinault Tribal Court. Persons denied enrollment may request a recommendation of adoption. (b) Persons denied a recommendation of adoption by a final act of the enrollment committee may request that the General Council adopt them at an annual meeting of the Council. The decision of the General Council shall be final.

SECTION 5 - OBJECTIONS TO ENROLLMENT: Any member may object to the enrollment of any person approved for enrollment at the time the name of that person approved for enrollment is presented to the General Council by the enrollment committee. The name of the member objecting shall be recorded and that objecting member shall have ninety (90) days to present sufficient evidence to cause reexamination of the enrollment application to the enrollment committee. During that ninety (90) day period and during any disenrollment investigation, the person objected to shall exercise the rights of a member. If the ninety (90) days shall pass without sufficient evidence being presented to the enrollment committee to cause the enrollment committee to reinvestigate the application, the person objected to shall be enrolled.

SECTION 6 - DISENROLLMENT: (a) The enrollment committee shall not begin review of the enrollment of a member without first notifying a person subject to a disenrollment investigation that he or she is subject to such an investigation and allowing such person to view all

evidence being used to question member status. (b) the enrollment committee in a disenrollment investigation shall follow all procedures set out herein for enrollment, including presentation of the names of any finally disenrolled person to the General Council at the next annual meeting of that Council. (c) exclusive grounds for disenrollment shall be that a person submitted fraudulent evidence in the application for enrollment in the Quinault Nation in order to qualify under the provisions of this Constitution, (d) adopted members shall not be subject to disenrollment proceedings, (e) persons finally disenrolled shall have the right to appeal their disenrollment to the Quinault Tribal Court.

ARTICLE III - GENERAL COUNCIL

SECTION 1 - MEMBERSHIP IN THE GENERAL COUNCIL: All members, including adopted members of the Quinault Nation shall be members of the General Council.

SECTION 2 - VOTING: Members of the General Council age 18 years or more, who are present at the appointed time and place of elections shall be permitted to vote in General Council meetings.

SECTION 3 - MEETINGS: (a) The annual meeting of the General Council shall be held on the last Saturday in March at a place within the boundaries of the Quinault Reservation. (b) All meetings of the General Council shall be announced by the Business Committee by posting notices at Taholah, Queets, Amanda Park and any other place determined by the Business Committee at least ten (10) days in advance of the meeting and by publishing notice in a newspaper of general circulation in the vicinity of the Reservation. (c) Special meetings may be called by the Business Committee or by fifty (50) voting members by giving and posting the required notice. (d) The purpose of the General Council meetings shall be to elect or recall the members of the Business Committee and to declare the will of the General Council on issues placed before the General Council by the agenda and by persons raising issues at any meeting. (e) A quorum for conducting business at any meeting shall be fifty (50) voting members. (f) The agenda for the annual meeting shall be published by the Secretary of the Tribe. All items to

be placed on the agenda shall be submitted to the Secretary thirty (30) days in advance of the annual meeting. Items o the agenda shall be considered befo issues or questions raised from the floor. (g) In addition to the annual meeting, quarterly General Council meetings may be held.

SECTION 4 - BILL OF RESERVED POWERS: The following powers shall be reserved to the General Council and the Business Committee or other agency of the Nation shall be required to obtain the advise and consent of the General Council prior to taking any action with regard to these powers. Any action the Business Committee shall take with regard to these powers without obtaining the advice and consent of the General Council shall be void and have no legal effect. (a) The relinquishment of any National criminal or civil jurisdiction to any agency, public or private; provided that this section shall not prevent the Business Committee from commissioning non-National or non-Bureau of Indian Affairs peace officers to enforce National laws and regulations. (b) The termination of the

Quinault Reservation. (c) The adoption of person into the Nation. (d) The sale of hunting or fishing rights, grounds, or stations. (e) Any other act which jeopardizes any treaty right of the Quinault Nation; or is prohibited to the Business Committee by this Constitution, or by instruction of the General Council, without prior approval of the General Council.

ARTICLE IV - BUSINESS COMMITTEE

SECTION 1 - OFFICERS: The officers of the Nation shall consist of the President, the Vice-President, Secretary and Treasurer and seven (7) Councilmen. The said eleven (11) officers shall constitute the Business Committee of the Quinault Nation and all shall have the right to vote on issues brought before the Business Committee.

SECTION 2 - QUORUM: A quorum of the Business Committee shall consist of at least six (6) officers, including the President and Vice-President, and decisions shall be made by a majority vote of those present. In the absence of the President and Vice-President, no meeting shall be held unless an officer has been

duly appointed by the President or the Vice-President to chair the meeting.

SECTION 3 - ELECTION: The officers shall be elected at the annual meeting of the General Council and shall serve three year staggered terms. Nominations shall be made from the floor. Election shall be by secret ballot. No absentee ballots shall be allowed. Officers shall be elected one at a time. When during the course of any General Council meeting, any presently serving officer shall be elected to fill any other position on the Business Committee, the position vacated by the election shall be immediately filled by electing another qualified person to the remainder of the term of the vacated position.

SECTION 4 - QUALIFICATIONS: Any enrolled member who maintains permanent residence within the Reservation boundaries, is present at the election, and is entitled to vote in the General Council, shall be eligible to be elected as an officer of the Nation, provided that no more than one brother, sister, father, mother, husband, wife or child of any person already serving as an officer may

be elected as an officer. Officers moving their residence outside the boundaries of the Reservation during their term of office will be considered to have resigned from the Business Committee.

SECTION 5 - REMOVAL: (a) Any officer who is absent from three consecutive regular Business Committee meetings without an excuse acceptable to the Business Committee or who commits acts in violation of his position of trust as an officer of the Quinault Nation shall be removed from office. (b) Prior to removal pursuant to (a) above, the officer whose removal is contemplated shall be given a reasonable opportunity to answer charges and a written statement of the charges against him shall be made available to him fifteen (15) days prior to said meeting. (c) An officer who has been removed shall have the right within thirty (30) days to file an appeal to the General Council. In the event of such an appeal, the Business Committee shall promptly call a special meeting of the General Council, at which special meeting, it shall be decided whether the removed officer shall be permanently

removed. Failure to obtain a quorum of the General council at such a special meeting shall be considered affirmation of removal of any officer.

SECTION 6 - RECALL: Any officer may be removed for any reason by vote of the General Council on a recall petition, specifying the reasons for removal. A recall petition shall be signed by at least fifty (50) qualified voters, and filed with the Business Committee. Upon the filing of such a petition, the Business Committee shall promptly call a special meeting of the General Council. Written notice of the petition shall be given to the officer at least fifteen (15) days prior to the meeting, and he shall be entitled to state his case before the General Council. The decision of the General Council shall be final. Failure to obtain a quorum at such a General Council meeting shall require the dismissal of the recall petition and no new recall petition may be filed against the officer in question for a period of one year following said meeting.

SECTION 7 - VACANCIES: Vacancies on the Business Committee shall be filled no

more than sixty (60) days following the occurance of a vacancy by a 2/3 vote of a quorum of the remaining officers; provided that such appointee is a voting member of the Nation and is otherwise qualified. The vacancy shall be filled by election at the next General Council meeting for the remainder of the existing term. No person not elected to the Business Committee by the General Council shall be appointed to the position of President or Vice-President.

SECTION 8 - MEETINGS: Regular open meetings of the Business Committee shall be held at least once in each month on a regular schedule set by the Business Committee. Special meetings may be called on a reasonable notice to all officers. Executive sessions of the Business Committee may be held on majority vote of the Committee. All regular meetings shall be held within the boundaries of the Quinault Reservation.

SECTION 9 - BY-LAWS: The Business Committee shall by ordinance adopt its own procedures and duties of officers, except as herein provided.

ARTICLE V - POWER AND RESPONSIBILITIES OF THE BUSINESS COMMITTEE

SECTION 1 - GENERAL: It shall be the duty of the Business Committee to govern all people, resources, lands, and waters under the jurisdiction of or reserved to the Quinault Nation in accordance with this Constitution, the Quinault Tribal Code of laws, the Quinault Treaty, the laws of the United States expressly limiting the powers of the Quinault Nation, and the instructions of the General Council. Any rights, powers and authority expressed, implied, or inherent vested in the Nation but not expressly referred to in this Constitution shall not be abridged by this Article, but shall be exercised by the Business Committee or the General Council by the adoption of appropriate ordinances and agreements.

SECTION 2 - LAWS: The Business Committee shall have the power to enact laws for the welfare of the Nation; provided, however, that such laws are not in conflict with this Constitution, and that public hearings be held on each such law prior to their adoption.

SECTION 3 - POWERS: The Business Committee shall have the power: (a) To enter into agreements on behalf of the Nation with federal, state, and local governments or agencies, and other public and/or private organizations or persons; provided, that these agreements are not in conflict with this Constitution, the instructions of the General Council, or the laws of the Quinault Nation. (b) To provide for the execution and enforcement of the laws of the Quinault Nation; and to establish an independent Tribal Court, and to provide by law for its jurisdiction, procedures, and appointment or election of its judges; and to charter and regulate associations, corporations for profit and not for profit, towns, special districts, schools, religious institutions, financial institutions and all other entitities; and to establish National enterprizes as branches of the National government. (c) To levy and collect taxes on members and other persons or entities within the National jurisdiction; provided that no tax shall be levied on trust real property; further provided that no tax shall be levied

without holding public hearings convenient in time and place to all members of the Quinault Nation and those subject to its jurisdiction; to determine the need for, and effect of, such a tax. (d) To assert the defense of sovereign immunity in suits brought against the Nation and to waive the said defense by agreement where National realty or personalty not held in trust by the United States is pledged or when property held in trust by the United States is pledged with the consent of the United States. (e) To govern the sale, disposition, and lease of tribally owned assets, and to provide for the zoning and other land use regulation of all lands within the boundaries of the Reservation and the jurisdiction of the Quinault Nation; and for the purity, volume, and use of all water to which the Quinault Nation and the Quinault people are entitled; and for the purity of the air within the Quinault Reservation. (f) To manage, lease, permit, sell, or otherwise deal with tribally owned lands, tribally owned interests in lands, water rights, fishing stations, mineral rights, hunting

grounds, fish and wildlife resources; or other tribally owned assets, and to purchase or otherwise acquire lands or interests in lands within or without the Reservation, and to hold those lands in tribal or federal trust and to regulate allotted trust and non-trust lands within the Reservation boundaries insofar as such regulation is not prohibited by federal law and does not violate the rights of owners; provided, that tribally owned lands held in trust by the United States shalls not be sold or encumbered unless authorized by the General Council. The authority to manage National lands and timber may be delegated to a special committee or committees. (g) To engage in any business that will further the economic well being of the Nation and of the members of the Nation, or undertake any program or projects designed for the economic advancement of the people or the Nation; and to regulate the conduct of all business activities within Reservation boundaries. (h) To borrow money from the federal government or other sources, to direct the use of such funds of productive purposes, and to pledge or

assign chattels or income due or to become due. (i) 1--To administer any funds within the control of the Nation in accordance with an approved National budget; to make expenditures from available funds for tribal purposes including salaries and expenses of tribal employees or officials, 2--The Business Committee shall prepare an annual Nation budget, 3--This budget shall include all normal operating expenses, any special projects or expenditures contemplated by the Nation, 4--All expenditures of tribal funds by the Business Committee shall be authorized by it or by the General Council in legal session and the amounts so expended shall be a matter of public record. 5--The Business committee shall have authority to approve amendments to the Nation's annual budget for special appropriations in any budget year. 6--The approved budget shall be posted at the National Business Office in Taholah, Queets, and the Post Office in Taholah. (j) To provide for an escheat in order that real and personal property of members who die intestate and without heirs shall revert to the Nation. (k) To

manage, protect and preserve the wildlife and natural resources of the Nation and to regulate hunting, fishing, including shell-fishing, and trapping within the jurisdiction of the Nation. This power may be delegated to a special committee or committees. (l) On petition by fifty (50) voting members of the Nation or on its own motion, the Business Committee shall, within a reasonable time, hold a general membership election by secret ballot on any issue. (m) All officers and employees of the Nation who have possession of tribal funds shall account for same periodically to the Business committee. All officers and employees handling National funds shall be bonded. There shall be an annual audit of all National funds handled by National officers or employees to be performed by the Bureau of Indian Affairs or Certified Public Accountants. (n) To condemn land or interest in lands for public purposes within the boundaries of the Reservation; provided that owners of the lands condemned shall be paid the fair market value of such lands and any timber or buildings thereon. (o) To exact all laws

which shall be necessary and proper for carrying into execution any power delegated to the Business Committee or delegated to any person or committee under the supervision of the Business Committee. (p) To govern the inheritance of real and personal property owned by members.

ARTICLE VI - RATIFICATION

This Constitution shall go into effect when ratified by two thirds (2/3) of all members eligible to vote, present and voting at a General Council meeting at which a debate and vote on this Constitution has been placed on the agenda. All enrolled members of the Quinault Nation shall be notified of such a General Council meeting at least thirty (30) days prior to such a meeting, and the notice provided shall make specific reference to the proposed ratification of this Constitution. Election of officers provisions shall not take effect until the annual meeting of the General Council following the adoption of this Constitution.

ARTICLE VII - AMENDMENT

SECTION 1: This Constitution may be

amended by a two thirds (2/3) vote of a quorum of the General council at an annual or special meeting, provided, however, that the notice of the meeting at which an amendment is proposed shall be given at least thirty (30) days before the meeting, and shall set forth the proposed amendment and an explanation thereof; and provided further that after discussion of the amendment at the meeting there shall be a recess of at least 30 minutes to enable the members to further discuss the amendment among themselves.

SECTION 2: The Business Committee shall call a meeting to consider a proposed amendment upon its own motion, or upon receipt of a petition signed by fifty (50) voting members or upon resolution of the General Council.

ARTICLE VIII - ENFORCEABILITY

The provisions of the Constitution shall be enforceable exclusively in the Quinault Tribal Court and in the Federal Courts of the United States where provided by federal law, and shall not be enforceable in any other Court, except where the Quinault Tribe brings suit in

its own name in any other court. This section shall not be interpreted as a consent to suit or waiver of sovereign immunity by the Quinault Indian Nation.

ARTICLE IX - APPROVAL OF SECRETARY OF INTERIOR

The Secretary of the Interior shall have the power to review actions taken pursuant to the herein named powers and all other National powers, but only in those cases and only to the extent that the Secretary has been given such powers of review by express statutory command of the Congress of the United States.

ADOPTED MARCH 22, 1975.

EXCERPTS, QUINAULT TRIBAL CODE OF LAWS

Section 18.03 Remedies. Upon a finding by the Court that a person or property is in violation of such ordinances, the Court may issue one or more orders as follows:

(a) An order directing the violator or owner of property in violation to pay such civil fines as may be authorized by the ordinance.

(b) An order directing the violator to cease and desist from further violation.

(c) An order directing the owner of property in violation to remove or modify the property so as to eliminate the violation.

(d) In event of failure of violator or owner to adhere to an order issued as in subsection a, b and c above, the Court may order the violator or owner to leave the Reservation and not return until the order is complied with, in accordance with Title 17 of this Code.

(e) In event of failure of an owner after a reasonable time to adhere to an order issued as in subsection c above,

the Court may order tribal officers to modify or remove the property, or if not capable of modification or removal, to destroy it, in order to eliminate the violation, and the cost thereof shall be assessed against the owner.

NO. 81-2275

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

JOHN C. CARDIN,
Petitioner,

v.

JOSEPH B. DE LA CRUZ, THE HON. CAROL BURGETT, SANDY WELLS, OLIVER MASON, HAZEL OBI, JAMES HARP, GUY MCMINDS, PEARL BALLER, WARREN SHALE, MAX HUDSON, LAWRENCE HALL, PHILLIP MARTIN GERALD ELLIS, THE BUSINESS COMMITTEE OF THE QUINAULT INDIAN NATION, THE QUINAULT TRIBAL COURT,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR CERTIORARI

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ABCD AT CRAFTSMAN PRESS, SEATTLE

Questions Presented

1. Petitioner's Questions 1 and 2 pose a single question: Whether an on-reservation business in an Indian fishing village selling food to Indians that is exposed to potential rodent contamination, that invites Indians to do business in a wooden store that is a fire hazard, that keeps unlocked, abandoned refrigerators in open areas where children play, and that maintains a garbage dump in the village may claim an absolute immunity from tribal government civil regulations protecting the health and safety of the Indian community because that business is operated on reservation fee land by a non-Indian?

2. May Petitioner's Question 3(1) be raised for the first time in this Court when the issue of approval by the Secretary of Interior of the Quinault Constitution and laws was not pleaded, raised, or considered in either Court below?

3. May Petitioner's Question 3(2) be raised for the first time in this Court when in both Courts below, notwithstanding uncontroverted record evidence that Petitioner's business conduct directly threatened the health, safety and economy of the Indian fishing community of Queets, Petitioner relied on an absolute claim of immunity to tribal civil jurisdiction regardless of the facts?

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No. 81-2275

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN C. CARDIN,

PETITIONER

v.

JOSEPH B. DELACRUZ, ET AL.,

RESPONDENTS

Respondents' Brief in Opposition

The respondents, tribal government officers of the Quinault Indian Nation, urge this Court to deny review of the judgment below, reported at 671 F.2d 363.

Statement of the Case

The Indian fishing village of Queets is located within the Quinault Reservation in a remote part of the

Olympic Peninsula on the Coast of Washington State. The village population is 250 Indians and 20 non-Indians (approximately 92% Indian). Pet. at 102a. This village is located at the ancestral fishing grounds of the Queets Band of Indians at the mouth of the Queets River.

The Quinault Indian Nation (the Tribe) enforces reasonable, nondiscriminatory civil health and safety laws for the protection of the Indian village of Queets. These regulations are applicable to all businesses selling food to Indians, whether Indian owned or not. Petitioner claims an absolute immunity from such regulations in his business of selling food and other products to the Indians of Queets.

A neutral summary of the core facts in this case is found in the Magistrate's report, reprinted at Pet. 101a-105a. These uncontroverted findings of fact were not objected to by any party and were not

disturbed by the District Court or the Court of Appeals. Uncontroverted facts of record and all facts alleged by the Respondents must be accepted as true since the District Court ruled that Petitioner was absolutely immune to tribal civil jurisdiction as a matter of law.

In 1978, at the request of Petitioner's predecessor in interest, the Queets Store was inspected by the tribal building inspector. Applying the national standards of the Uniform Building Code, 20 violations were identified.—/ After Petitioner

—/ Both the Quinault Indian Nation and the State of Washington have adopted the Uniform Building Code. Petitioner conceded that the State had never enforced its code at his store. Enforcement of the state code is the responsibility of the various counties. That the state code was never enforced as to Petitioner may be explained by the fact that the reservation Indian community of Queets is located in an appendage to Jefferson County separated from the county seat in Port Townsend by the wilderness expanse of the Olympic National Park and by 160 miles of road, mostly through adjacent Clallam County.

acquired the Store, he attended the October 10, 1978 meeting of the Quinault Business Committee (tribal council). Petitioner said he was aware of the Store's building code problems, that he was interested in working with the Tribe, and his belief that six months would afford him adequate time to complete the repairs. The Quinault Business Committee granted Petitioner six months to complete repairs.[1]

More than six months later, in May of 1979, Petitioner opened the Store without completing these repairs. Some of the

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[1] Non-Indians participate in many aspects of Quinault tribal political affairs, including service on juries in Tribal Court, as members of the Tribal Planning Commission, on employee personnel grievance committees, and in executive and advisory position of tribal business enterprises. Non-Indians also are provided a number of tribal government services, including police and fire protection, garbage collection, television transmission, sewage disposal, social services, alcoholism and health related programs, adult education classes, ambulance service, and water procurement and distribution. CR 11, DeLaCruz Aff.

Store's continuing deficiencies created a fire hazard and exposed food kept there to rodent contamination. 671 F.2d at 364 n.1.

On June 11, 1979, the Business Committee advised Petitioner he could get a temporary permit to operate the Store if he could agree to a timetable to complete repairs. Petitioner rejected the Tribe's offer and continued to operate the Store.

The Tribe then obtained an injunction in Tribal Court ordering Petitioner to close the Store.—/ Appellee refused to obey the court order and tribal police closed his store. Four days later,

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—/ Petitioner's Brief, at 6, erroneously asserts that Petitioner never attended any Tribal Court hearing. The Tribal Court's Order of June 12, 1979 establishes that Petitioner was notified of and in fact appeared in that Court proceeding. CR 12, Attachment 1, at 32. Petitioner refused to participate in the Tribal Court hearing on April 11, 1980. Pet. at 95a; 104a-105a 671 F.2d at 365.

Petitioner obtained a 30-day temporary certificate of occupancy from the Tribe to reopen his store and the Tribal Court then dissolved its injunction . Again he did not make the repairs and improvements the Tribe wanted. In September 1979 the Tribe sued in Tribal Court to require correction of these deficiencies or closure of the Store. 671 F.2d at 365.

On October 10, 1979 Petitioner was advised by the Tribe that several unlocked, abandoned refrigerators in open areas on his property constituted a threat to the lives of children who play in the area and that the open garbage dump, scrap wood, tires, washers, dryers, abandoned stoves and other materials scattered around Petitioner's property created risks of fire, disease and other injury that jeopardized the safety of the Indian community. Pet. at 103a-104a.

Petitioner filed this action to enjoin

tribal officers from regulating the effects of his business on the Indian community. Petitioner did not assert that the tribal regulations were unnecessary, unreasonable, or unevenly applied. Instead, Petitioner asserted that he was subject exclusively to state regulation. However, Petitioner conceded that the State had done nothing to enforce any building and safety laws to remedy dangerous conditions created by Petitioner. Petitioner also conceded that he had never requested State authorities to inspect his property until instructed to do so by his attorney in this case. Even then, he conceded, the State took no action. There is, therefore, no conflict with state law here. The Quinault Indian Nation only seeks to protect the health, safety and economy of the Indian community of Queets.

Summary of Argument

1. The Court of Appeals' decision is fully consistent with the decisions of

this Court.

2. This case fits well within the existing tests for the proper exercise of tribal government authority.

3. The Quinault Nation has a substantial interest in protecting the health, safety and economy of the on-reservation Indian village of Queets.

4. On-reservation businesses which voluntarily sell potentially contaminated food to Indians and which jeopardize the health, safety and economy of the Indian village of Queets are subject to reasonable tribal civil regulations applicable to all such businesses, whether Indian or non-Indian owned.

5. Under the compelling factual circumstances of this case, the exercise of evenhanded tribal civil regulatory authority was justified by paramount federal and tribal interests.

6. The uncontroverted factual

circumstances of this case involving commercial dealings between an on-reservation retail food supplier and reservation Indians, and conduct within an Indian village by a non-Indian business threatening the economy, health and safety of the Indian community are unique. The fact-specific decision of the Court below does not conflict with the decisions of any other circuit court.

7. Questions not raised or considered by the Court of Appeals should not be reviewed for the first time in this Court.

Argument

Decisions of This Court Establish the Legal Standard Applied By The Court of Appeals.

This Court's decisions confirm the existence of tribal civil jurisdiction to regulate on-reservation commercial transactions with Indians and to protect the health, safety, and economy of established Indian communities. Montana v. United

States, 450 U.S. 544, 565-566 (1981); Washington v. Confederated Colville Tribes, 447 U.S. 134, 153 (1980); McClanahan v. Arizona Tax Commission, 411 U.S. 164, 179 (1973); Williams v. Lee, 358 U.S. 217 (1959) The Court of Appeals faithfully applied these principles to a reservation food business in an Indian village engaged in commercial dealings with Indians and operating with disregard for the health and safety of its Indian customers and neighbor

The Court of Appeals carefully applied principles established in previous decisions of this Court. The Court of Appeals stated that "that the dependent status of Indian tribes has implicitly divested them of power to regulate, in general," 671 F.2d at 366 (emphasis by Court of Appeals), non-Indian activities which bear "no clear relationship to tribal self-government or internal relations." Montana v. United States, 450 U.S. at

564.

The Court of Appeals added that "the Montana decision acknowledged that Indian tribes have retained the power to impose certain kinds of regulations on the activities of a non-member on fee lands within their reservations." 671 F.2d at 366. The Court of Appeals recognized two categories identified by this Court in Montana as justifying the exercise of tribal civil jurisdiction. Id.

First, "A tribe may regulate through taxation, licensing, or other means, the activities of nonmembers who enter consensual relations with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." Montana v. United States, 450 U.S. at 565. In this case, the record shows that Petitioner invites Indians into a commercial building in order to sell them food and other products. In addition, Petitioner's

predecessor in interest invited tribal inspection of building conditions at the Queets Store and promised to repair deficiencies; deficiencies which Petitioner himself acknowledged at the October 10, 1978 meeting of the Quinault Business Committee when he stated his interest in working with the Tribe and gave his assurance that six months would afford him adequate time to complete repairs. Thus, there are commercial relations between Petitioner and tribal members as well as consensual relations with the Tribe upon which to base the exercise of tribal civil jurisdiction.

Second, this Court said in Montana that "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the

health or welfare of the tribe." 450 U.S. at 566. The conduct Petitioner asserts a right to engage in jeopardizes these tribal interests in several ways. Pet. at 103a-104a.

Petitioner is inviting Indians into a building that is a fire hazard. One of the building's deficiencies permits the accumulation of fire fuels under the floor of this old wooden building. Such a fire threatens not only those who enter the Store at Petitioner's invitation but also the safety and property of Indians remaining in their own homes to which a fire starting on Petitioner's property might spread. Likewise, the safety of Indians who respond to put out fires in the village is endangered.

Petitioner also asserts that he has a right to offer for sale food that is exposed to possible rodent contamination due to his failure to comply with Building

Code criteria. Indian families consuming contaminated food in their own homes would suffer illness or disease which would then be complicated by the isolated location of the village and its distance from medical facilites, with resulting delay in treatment. Medical and transportation costs as well as earnings lost during such sickness would impose economic burdens on impoverished Indian families and tribal government social services agencies.

Petitioner also has collected abandoned, unlocked refrigerators in open areas around his property. The record includes several photographs showing children playing around them. These attractive nuisances are the very jaws of death waiting to swallow unsuspecting children.

Petitioner also maintains an open garbage dump on his property in Queets. This nuisance provides a breeding place from which rodents and other organisms may

spread disease to Petitioner's Indian neighbors. Other dangerous and combustible materials collected around Petitioner's property threaten to cause personal injury, fire, and damage to Indians and their property.

The Decision Below Accommodates Both Tribal and State Interests

This Court has not applied "mechanical or absolute conceptions of state or tribal sovereignty" in cases involving the exercise of tribal civil regulatory jurisdiction over on-reservation activities of non-Indians. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980). Instead, the Court has required a particularized inquiry into the nature of the federal, tribal and state interests at stake. Ramah Navajo School Board, Inc., v. Bureau of Revenue, 50 U.S.L.E. 5101, 5102 (July 2, 1972). That inquiry is made easier in this case not only because criti-

cally important federal and tribal intersts are at stake, but also because the Tribe does not contest the exercise of concurrent state jurisdiction over Petitioner.

Significant federal interests require tribal protection of the health and safety of reservation Indian communities. Minutes of the Treaty negotiations between the United States and the Quinaults and other tribes show that Governor Stevens, who negotiated the Treaty for the United States, urged agreement to the Treaty, 12 Stats. 971, so that the Quinaults would have a "permanent home where we can prevent bad white men from injuring you." Report on the Source, Nature, and Extent of the Fishing, Hunting, and Miscellaneous Related Rights of Certain Indian Tribes in Washington and Oregon at 356 (U.S. Dept. of Interior 1942). Governor Stevens assured that agreement to the Treaty would provide Indians with "a place where you

cannot be driven off." Id. at 365. Implicit in the Treaty's guarantee of a permanent tribal homeland and federal protection was that jurisdiction over reservation affairs affecting Indians remained in the tribal government. Williams v. Lee, 358 U.S. at 221-223. This tradition of Indian sovereignty "is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development." White Mountain Apache Tribe v. Bracker, 448 U.S. at 143. E.g., Indian Health Care Improvement Act, 25 U.S.C. §1601. Decisions of this Court and the widely held understanding within the federal government confirm that Indian tribes retain a broad measure of jurisdiction over non-Indian activities on Indian reservation lands in which the tribes have a significant interst. Washington v. Confederated Colville Tribes, 447 U.S. at

152-153. Consistent with these overriding federal interests, tribal governments may exercise civil jurisdiction to regulate non-Indian business activities on Indian reservation fee land which threaten the economy, health or welfare of reservation Indian communities. Montana v. United States, 450 U.S. at 565-566.

The Brief of the United States of America as Amicus Curiae, at 5, in the Court of Appeals states:

> In the instant case, the federal interest is fully supportive of the exercise of tribal authority by the Quinault Indians. Congress and the courts have repeatedly affirmed that "well-established federal 'policy of furthering Indian self-government.'" Santa Clara Pueblo [v. Martinez, 436 U.S. 49, 62 (1978)]. Enforcement of health and safety regulations has been viewed throughout our nations's history as central to the sovereignty of a government. See, e.g. Mintz v. Baldwin, 289 U.S. 384 (1933). The unwillingness of the Cardins to conform to the Quinault tribe's building code poses grave dangers to the health and safety of nearby residents and store customers. Fire and food contamination are two of the most bla-

> tant hazards caused by the Cardins' indifference to twentieth century building standards. And yet, despite these dangers, the Washington State government never attempted to enforce the State building code at the Cardins' property. It is clear, then, that the Quinault's exercise of self-government is crucial to the fulfillment of the federal desire that Indian tribes, through the upgrading of their government, escape from "a century of oppression and paternalism." Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 1973)....

There can be no doubt that "essential tribal relations" in an existing Indian village are "jeopardized" by business practices involving sales of potentially contaminated food, operation of a store with fire hazards, keeping unlocked refrigerators where children play, and maintaining an open garbage dump in a village. Williams v. Lee, 358 U.S. at 219. Fundamental tribal governmental interests in the health, safety and economy of reservation Indian communities are threatened by such conduct Montana v. United States, 450

U.S. at 565-566.

The Respondents have not contested State concurrent jurisdiction over Petitioner. Thus, although the State in fact has not taken any enforcement action as to Petitioner, it remains free to do so.

In McClanahan v. Arizona Tax Commission, 411 U.S. 164 179 (1973), this Court noted that both the tribe and the state often may claim an interest in asserting their respective jurisdictions in regard to non-Indian activities on the reservation. Absolute, "automatic exemptions" in such cases"are unusual". White Mountain Apache Tribe v. Bracker, 448 U.S. at 144. Where there is no direct conflict, each government is free to impose its regulations without ousting the other. Washington v. Confederated Colville Tribes, 447 U.S. at 158-159.

Paramount federal and tribal interests in the health, safety, and economy of the

Indian community of Queets amply justify the tribal regulations in this case. Since the state also is free to regulate Petitioner, the decision below gives adequate room for state interests.

There Is No Conflict In The Circuits

Decisions of this Court establish the law about when a tribe may exercise civil jurisdiction over non-Indians. Cases applying that law are highly fact specific, turning on the level of legitimate tribal interests in protecting health and safety in the Indian community. None of the other lower court cases discussed by Petitioner involve either the sale of potentially contaminated food to Indians in an Indian village or the other facts which make the Quinault Tribe's interest in these regulations unique. Thus, even if those other cases did not correctly apply the law about the proper exercise of tribal juris-

diction, they are distinguishable on their facts and provide no basis for reviewing the present case.

Prior Decisions Of This Court Foreclose Petitioner's Constitutional Claim

Petitioner asserts that unspecific constitutional problems exist if non-members are subject to tribal civil jurisdiction. That argument, as the Court of Appeals recognized, 671 F.2d at 367, has been rejected by this Court on several occasions. Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894, 906-907 (1982); United States v. Mazurie, 419 U.S. 544, 557-58 (1975); Williams v. Lee, 358 U.S. 217, 223 (1959).

In any event, a federal court could enjoin enforcement of tribal civil regulations which did not protect important tribal interests. Federal courts, thus can adequately protect non-Indians when their activities do not jeopardize tribal inter-

ests.

Questions May Not Be Raised For The First Time In This Court

For the first time in this case, the Petitioner asserts that the exercise of retained, inherent tribal civil jurisdiction by the Quinault Nation is invalid without approval of the Quinault Constitution and laws by the Secretary of Interior.

This issue was not raised or argued in the Court of Appeals,[1] nor was it

---

[1] That Question 3(1) is being raised for the first time in this Court can been seen from Petitioner's own statement of the Questions Presented in his Court of Appeals Brief, at iv:

> 1. Is a non-Indian who is not a tribal member, residing and doing business upon fee-patent property, subject to the civil jurisdiction of an Indian tribal court?
>
> 2. Does the United States Supreme Court's decision in Oliphant v. Suquamish Tribe declare non-existent all judicial power of Indian tribal courts over non-Indians?
>
> 3. Does the Indian General Allotment Act of 1887 limit the territory over which Indian tribal courts (cont'd)

pleaded in the District Court. Complaint, CR1 and 35. The rule against considering issues raised for the first time in this Court is intended to prevent sandbagging and the difficulty of deciding issues where there was no opportunity to present evidence or argument in the District Court or Court of Appeals. "Where issues are neither raised before nor considered by the Court of Appeals, this Court ordinarily will not consider them". Adickes v. Kress Co., 398 U.S. 144, 147 n.2 (1970). See also, Tennessee v. Dunlap, 426 U.S. 312, 314 n.2 (1976); United States v. Ortiz, 422 U.S. 891, 898 (1975); Lawn v.

__/(cont'd from page 22)
over non-Indians?

3. Does the Indian General Allotment Act of 1887 limit the territory over which Indian tribal courts may assert judicial power?

4. Is judicial power over non-Indians outside the scope of the internal self government arena of tribal regulatory authority?

United States, 355 U.S. 339, 362-63 n.16 (1958).

Similarly, Question 3(2) was not raised or considered in the Court of Appeals nor was it pleaded in the District Court. Indeed, both in the District Court and Court of Appeals Petitioner claimed an absolute immunity from tribal civil jurisdiction. Consistent with that singular claim of immunity, Petitioner did not controvert the record evidence establishing that he was offering for sale to Indians food that was exposed to rodent contamination, that his store is a fire hazard, that he keeps unlocked refrigerators in areas where children play, or that he maintains an open garbage dump in an Indian village. See Magistrate's Findings, Pet. 103a-104a. In fact, it was the very basis of Petitioner's claim in both Courts below that he had an absolute right to do

these things. Based on the uncontroverted record and Petitioner's own claims, the Court of Appeals applied standards of this Court and narrowly held that the Quinault Tribe could protect the health, safety and economy of the Indian community of Queets from threats appearing of record. Since Petitioner broadly claimed that the Quinault Nation could not protect even these interests, he did not present Question 3(2) to either court below and that question should not be considered for the first time in this Court.

Should this Court grant the writ, therefore, it should be limited to Question 1 or 2.

Conclusion

The Court of Appeals faithfully applied decisions of this Court regarding the proper exercise of tribal civil jurisdiction. The writ should be denied.

Respectfully submitted,

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No. 81-2275

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

JOHN C. CARDIN,

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v.

JOSEPH B. DE LA CRUZ, THE HON. CAROL BURGETT, SANDY WELLS, OLIVER MASON, HAZEL OBI, JAMES HARP, GUY MCMINES, EARL BALLER, WAREN SHALE, MAX HUDSON, LAWRENCE HALL, PHILIP MARTIN, GERALD ELLIS, THE BUSINESS COMMITTEE OF THE QUINAULT INDIAN NATION, THE QUINAULT TRIBAL COURT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Williams v. Lee, 358 U.S. 217, 3 L. Ed. 2d 251, 79 S. Ct. 269 (1959). 2

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REPLY OF PETITIONER JOHN C. CARDIN

THE COURT SHOULD NOT BE DIVERTED FROM THE REAL ISSUE OF THIS CASE.

Respondents have attempted (Response, Questions Presented 1, page i, and pages 2-7) to divert this Court's attention from the real issue of this case, i.e. whether or not non-Indians, who may not become members of a tribe because of their race, and who may not therefore participate in the formulation of tribal law, are to be subjected to the enforcement of that law by a tribal government and tribal court. (Petition, Questions Presented I and II, page i.)

The issue in this case is not whether the facts as found by a tribal court or alleged by tribal attorneys are correct or "uncontroverted," or whether Petitioner Cardin is a "bad" man, but rather which judge has the jurisdiction to determine the facts and enforce the law against non-Indians.

Some of Respondents' arguments are relevant to the real question at issue in this case, particularly at pages 16 and 17 of the Response. There, Respondents quote Governor Stevens, then Governor of the Territory of Washington, as stating that the Treaty of Olympia was entered so that the Quinaults would have a "permanent home where we can prevent bad white men from injuring you." Notice that Governor Stevens did not say "where you can prevent bad white men from injuring yourselves."

Respondents also cite Williams v. Lee, 358 U.S. 217 (1959). The proper reading of that case, in light of Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978), and as construed by Montana v. United States, 450 U.S. 544 (1981), is at the nub of the issue in this case.

SECRETARY OF INTERIOR APPROVAL OF THE QUINAULT CONSTITUTION

Respondents assert that the Court should not now consider Petitioner Cardin's question whether an Indian tribe, whose constitution has not been approved by the Secretary of the Interior, has governmental or judicial power over non-Indians. (Response at Question Presented 2 and 3, page i, and pages 23-26.) This Court first raised that issue by identifying that Secretary of Interior approval of tribal constitutions was an incident of protection for non-Indians when tribal civil authority is necessary to protect tribal self-government or to control internal relations. That identification was first made in Merrion v. Jicarilla Apache Tribe, 50 U.S.L.W. 4169, on January 25, 1982, after this case had been argued to the Ninth Circuit Court of Appeals.

THIS CASE IS NATIONALLY SIGNIFICANT

This is clearly a case of national significance. Throughout the western United States, non-Indians reside within the territorial boundaries of Indian reservations. In Washington alone, there

are twenty-three such reservations. Whether those non-Indians will be subjected to full governmental and judicial power by Indians in Indian courts with no rights of review or appeal, or to state and federal court jurisdiction, is significant to many states, including those fifteen who have filed briefs of amicus in this case or in the Petition of Namen and State of Montana v. Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, et. al., No. 82-22, which presents the same question.

CONCLUSION

The Petition for Certiorari in this case should be granted.

Respectfully Submitted

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BRIEF OF AMICI CURIAE STATES OF WASHINGTON, ARIZONA, IDAHO, MONTANA, NEBRASKA, NORTH DAKOTA, UTAH AND WYOMING IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. In the absence of a treaty provision or federal statute conferring such power, does an Indian tribe possess the power to regulate a non-Indian's use of his own real property when such property is located within the exterior boundaries of the tribal reservation?

II. May a federal court properly find such power to exist in the absence of: (1) Any review and approval by the Secretary of Interior of the tribal ordinance exerting such power, and (2) Any factual finding by a federal court after an evidentiary hearing, that the conduct being regulated threatens or has a direct effect upon the political integrity, economic security, or health and welfare of the tribe?

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No. 81-2275

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STATEMENT OF INTEREST OF THE AMICI

In the State of Washington there are twenty-three Indian reservations, recognized as such by the United States government. Much of the land on these reservations has passed into non-Indian ownership, pursuant to the federal policy embodied in various allotment acts, particularly including the General Allotment Act of 1887

(24 Stat. 388). These non-Indian owners have established homes, farms and businesses on these lands.

In Washington, statewide, the non-Indian reservation population is approximately 58,000, while the Indian population is approximately 14,000. This ranges from the Port Madison Indian reservation, with roughly 3,000 non-Indians and about 50 Indians (see, *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978)), to the Quinault Reservation, where the instant case arose, which has very few resident non-Indians.[1] Similar conditions exist in the other Amici States.

Thus, the State's interest in this controversy is the important right of a major segment of its population to be free from the authority of a tribal government in which they can have no part.

REASONS FOR GRANTING THE WRIT

I. CONFUSION STEMMING FROM *MONTANA v. U.S.* and *MERRION v. JICARILLA APACHE TRIBE.*

Amici do not intend by this submission to reiterate or rehash the arguments already presented in the Petition. We attempt merely, and briefly, to point out what we see as two additional areas of confusion stemming from the juxtaposition of *Montana v. United States*, 450 U.S. 544 (1981) and *Merrion v. Jicarilla Apache Tribe*, ___ U.S. ___, 50 U.S.L.W. 4169 (January 25, 1982). It is of course, the Court of Appeals' misinterpretation of *Montana* and misapplication of *Merrion* which causes the problem, and produces Petitioner's request for plenary review by this Court.

A. *Merrion.*

The Court of Appeals' reliance on *Merrion v. Jicarilla Apache Tribe, supra*, is misplaced. In *Merrion*, it must be kept in mind, the non-Indian parties were carrying out their business not on their own property, as is the case with Mr. Cardin here, but rather on property

---

[1] Although few non-Indians actually reside on the Quinault Reservation, even there fully 30% of the total reservation lands are owned by non-Indians.

owned by the tribe itself, or by the United States in trust for the tribe. The energy companies involved were severing the *tribe's* oil and gas from the *tribe's* property. They possessed no fee simple title to the property, including its mineral rights, derived from any patent issued pursuant to the General Allotment Act of 1887 (24 Stat. 388), as does Mr. Cardin here. *Merrion* thus does not even clearly tell us whether or not the tribal power there upheld extends to taxing a non-Indian, on non-Indian land, under circumstances where no business was being conducted with the tribe itself. Much less does it tell us whether or not that tribal power extends to regulating the activities of a non-Indian, on non-Indian land, where business, albeit conducted with individual tribal members, is not conducted with the tribe itself (see *Merrion, supra,* at 50 U.S.L.W. 4172.)

B. *Montana.*

The Court of Appeals' reliance upon *Montana v. United States, supra,* and particularly the *dictum* found at 450 U.S. 544, 565-566, is likewise misplaced. That case, and particularly that *dictum,* simply does not support the result reached by the Court of Appeals. Rather, we submit, it announces a test which, if applied to Mr. Cardin's situation here, should result in an absence of tribal jurisdiction over him and his property.

For ease of reference we will here repeat the language seized upon by the Court of Appeals from *Montana*:

> "* * * To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee,* 358 U.S. 217, 223; *Morris v. Hitchcock,* 194 U.S. 384; *Buster v. Wright,* 135 F.2d 947, 950 (CA8); see *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1979). A tribe may also retain inherent power to exercise civil authority over

> the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See *Fisher v. District Court*, 424 U.S. 382, 386; *Williams v. Lee*, 358 U.S. 217, 220; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128-129; *Thomas v. Gay*, 169 U.S. 264, 273 (Footnote Omitted)."

The most telling portion of that *dictum*, a portion seemingly totally ignored by the Court of Appeals, is the citation of the four cases following the first sentence quoted above. Those cases present an important comparison and, we suggest, indicate that the Court did not intend to go beyond—and indeed actually intended to limit the exercise of tribal power to—the types of situations found therein.[3]

Fisher v. District Court, 424 U.S. 382 (1976) may present the most obvious situation where a tribe retains inherent power to exercise civil jurisdiction. That case, recall, involved a tribal court's jurisdiction over adoption proceedings. The nexus there is obvious. Adoption controls membership, the makeup of the tribe itself. What was at stake in *Fisher* was not only the integrity of the tribe, but ultimately its ability to control its continuing existence as an ethnic and cultural unit—neither is at stake here.

Williams v. Lee, 358 U.S. 217 (1959) likewise presents a very close nexus with the political integrity of the tribe itself. What was at stake there, of course, was the integrity and viability of the tribal court system. If a tribal member could be made an involuntary defendant in a state court, the tribe's ability to apply and enforce its own laws *to and against its own members* could indeed be severely restricted. What was crucial to the outcome of that case, we submit, was not the effect on the tribal member of being subjected to state court jurisdiction, but the harm *to the tribe itself* flowing from the dilution of its own court's power and jurisdiction over its own members. No such possible dilution exists here.

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[3]Our assertion in this regard is bolstered by the Court's internal page citations to the opinions in each of the four cases.

U.S. 118 (1906); and *Thomas v. Gay*, 169 U.S. 264 (1898) provide the contrast, however. Both of those cases upheld the imposition of local or territorial personal property taxes to cattle grazing upon land within the exterior boundaries of the Flathead and Osage Indian Reservations. In both cases the tribes had granted grazing rights on the land involved. Here again the internal page references (200 U.S. 118, 128-129 and 169 U.S. 264, 273) are perhaps most enlightening. The Court in both cases rejected the challenge to the property tax in question because the impact of that tax upon the interests of the tribes involved, and the imposition of the tax upon that activity, was too "remote" to support tribal jurisdiction.

We suggest that the message from these two cases should be applied with the same force to the situation presented in the Petition. In order to support civil jurisdiction over a non-Indian, the tribal connection to the land or activities involved must be more than remote. Furthermore, that connection must be between the non-Indian land and activities and *the tribe itself*, and not simply with individual tribal members. Indeed, it may even be that the impact on the tribe itself, outside of the specific *Fisher* and *Williams* types of facts, must be so direct and the tribal nexus so close as to support exempting that land or activity from state taxation or jurisdiction, in order to support the assertion of tribal taxation or regulatory jurisdiction.

Amici submit, therefore, that the appropriate test to be applied in this area, one which seems to have been suggested, at least, by this Court in its *Montana dictum*, is this: Only when it is necessary to preserve the tribe as a unit, or necessary through control over non-Indians' conduct, may an Indian tribe possess civil jurisdiction to regulate non-Indian activity on non-Indian land. The question a tribe asserting such power must answer then is this:[3] Is it necessary to have jurisdiction over this non-

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[3]This question should be asked also by a federal court, in examining the validity of any assertion of jurisdiction, and by the Secretary of Interior before approving it (see *Merrion*, *supra*, 50 U.S.L.W. at 4172). Neither has taken place here. Thus Question Presented No. II.

member on his or her land, in order to preserve and effectuate our own jurisdiction over our own members, to enable us to preserve our integrity, economic security or welfare, *as a tribe, as a self-governing unit*? If the answer to that question is no, then the tribe possesses no regulatory power or civil jurisdiction over the non-Indian land and activities.

We submit then that in its *Montana dictum* this Court was actually approaching a test in this area very similar to that involved in *National League of Cities v. Usery*, 426 U.S. 833 (1976).[4] Indian tribes may exercise civil jurisdiction over non-Indians only when it is necessary to avoid impairing the tribes integrity, or their ability to function effectively *as a tribe*.[5]

II. THE CONTROVERSY IS OF NATIONAL IMPORTANCE.

This dispute is not limited to an isolated reservation on Washington's Pacific Coast. Tribes elsewhere

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[4]We recognize and acknowledge the narrow application of *Usery* evidenced by recent cases. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981); *Federal Energy Regulatory Commission v. Mississippi*, ___ U.S. ___, 50 U.S.L.W. 4566 (June 1, 1982). But that simply highlights the appropriateness of the analogy with *Usery*. The Court there drew—quite narrowly—the lines beyond which Congress could not go in regulating the states as states. It did so in order to preserve the integrity and viability of states in our federal system. So too in *Montana*, just as in *Fisher* and *Williams*, the concern of the Court was the integrity and viability of another form of government; *i.e.*, tribal self-government, and the integrity of the tribe's own governmental power over its own members.

In *Usery* Congress ran afoul of the Tenth Amendment because it attempted to apply its powers, derived from the Commerce Clause, directly against the states, *as states*. The Tenth Amendment was found to be a shield against this intrusion upon the states' ability to function effectively in a federal system. The latter cases show, however, that it is not a sword. Likewise, we submit, here. The concept of tribal self-government should be correctly viewed as a shield, permitting tribes to possess and exercise, consistent with their dependent status (see *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 171 (1973); *Montana, supra*, at 564.) only those powers necessary to function effectively *as a tribe*, but *not* as a sword, to pierce their dependent status and exercise, unfettered, general governmental powers over non-Indians.

[5]See also the Court's language in *Montana* found at 450 U.S. 564 and discussed at Pet., page 17, note 8.

throughout the country are asserting such civil regulatory power and jurisdiction over non-Indians within their reservations. To date, based we submit on the same improper interpretation of this Court's opinion in *Montana v. United States, supra,* and *Merrion v. Jicarilla Apache Tribe, supra,* the tribes appear to be succeeding. See, *e.g., Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. Namen,* ___ F.2d ___ (Ninth Cir., 1982), cert. pending under *Namen v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* No. 82-22; *Knight v. Shoshone and Arapahoe Tribes of the Wind River Reservation, Wyoming,* ___ F.2d ___ (Tenth Cir., 1982).

Indian tribes, non-Indian residents of their reservations, and the States in which those reservations exist, remain uncertain as to the extent of tribal civil regulatory powers and jurisdiction. That uncertainty will persist (in the absence of Congressional action) until this Court considers and announces the limitations of tribal powers in this area. Amici submit that this case, along with *Namen, supra,* presents an appropriate vehicle for such consideration by this Court.

CONCLUSION

Certiorari should be granted and this case set down for plenary review. In the event that the Court likewise grants certiorari in *Namen,* amici suggest that the Court consider the appropriateness of hearing the cases in tandem.

DATED this 2nd day of August, 1982.

Respectfully submitted,

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